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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EASTERN AIR LINES, INC.,

Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and EASTERN AIR LINES MASTER EXECUTIVE COUNCIL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Railway Labor Act limits a carrier's right to use self-help in the face of a crippling strike by prohibiting the carrier from treating newly hired replacements in training as permanent replacements for strikers, where the offers of permanent employment accepted by the replacements were unconditional, and where the carrier could not have recruited sufficient replacements to restore its operations without making such unconditional offers of permanent employment?

STATEMENT OF INTERESTED PERSONS

All parties to this case are named in the caption. Pursuant to Rule 29.1 of the Rules of this Court, petitioner Eastern Air Lines, Inc. ("Eastern") hereby states that its nominal parent company is Continental Airlines Holdings, Inc. ("CAH"). On April 19, 1990, a Chapter 11 Bankruptcy Trustee, Martin R. Shugrue, Jr., was appointed by the United States Bankruptcy Court for the Southern District of New York to manage and control Eastern, replacing CAH (then known as Texas Air Corporation) and its management. *See In re Ionosphere Clubs, Inc.*, 113 Bankr. 164 (Bankr. S.D.N.Y. 1990).

Eastern's only non-wholly owned subsidiary is Bar Harbor Airways, Inc. ("BHA"). Eastern owns 99.5% of BHA's outstanding stock.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Eastern Air Lines, Inc. ("Eastern") respectfully seeks review of the decision of a split panel of the Eleventh Circuit holding that Eastern could not treat new hire pilots as permanent replacements for strikers before the new hires completed Eastern's training. The decision ignores uncontradicted evidence that Eastern was only able to recruit a sufficient number of replacement pilots to continue flying during the strike by offering them permanent employment from their first day of training. Unless this Court reviews the decision, Eastern's bankrupt estate will face tens of millions of dollars in claims for back-pay from strikers, and airlines will effectively lose their right to hire permanent replacements for striking pilots.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 920 F.2d 722 and is reprinted at pages 1a to 19a of the Appendix ("App."). The order of the United States Court of Appeals for the Eleventh Circuit denying rehearing and rehearing in banc is not yet reported, but is reprinted at App. 31a to 32a. The Eleventh Circuit's mandate is reprinted at App. 33a to 34a. The order of the United States District Court for the Southern District of Florida, which Eastern appealed, is reported at 744 F. Supp. 1140 and is reprinted at App. 20a to 30a.

JURISDICTION

The opinion and judgment of the Eleventh Circuit were entered on December 20, 1990. App. 1a, 34a. Eastern's Petition for Rehearing and Suggestion of Rehearing In Banc was denied on March 15, 1991.[1] App. 31a-32a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* The provisions of the RLA

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[1] Pursuant to Eleventh Circuit Rule 35-6, Eastern's pleading, which was entitled "Suggestion of Rehearing In Banc," was also treated as a Petition for Rehearing. *See* Eleventh Cir. R. 35-6 ("A suggestion of rehearing en banc will also be treated as a petition for rehearing before the original panel."); App. 32a ("The Petition(s) for Rehearing are DENIED. . .the Suggestion(s) of Rehearing En Banc are DENIED."). Thus, this Petition for Writ of Certiorari is timely filed within 90 days of the Eleventh Circuit's order denying rehearing and rehearing in banc. *See Missouri v. Jenkins*, ___ U.S. ___, 110 S. Ct. 1651, 1662 (1990) (noting Eleventh Cir. R. 35-6).

relied upon by the Eleventh Circuit are reprinted at App. 60a to 61a.

STATEMENT OF THE CASE

The Eleventh Circuit's decision will imperil airlines during future strikes. As the record here shows, pilots will not leave their jobs to join a carrier as replacements for strikers contingent on completing several weeks of federally-required training before the strike ends, whenever that may be. The decision eviscerates the airlines' right under *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938) ("*Mackay*") to operate during strikes with permanent replacements, conflicts with decisions in other circuits,[2] and implies a new limitation on self-help under the RLA contrary to this Court's decision in *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 442 (1989) ("*Trans World*").

A. Statement of Facts

On March 4, 1989, the Air Line Pilots Association, International ("ALPA") launched what it termed a sympathy strike against Eastern, and only 6% of Eastern's pilots reported for work. App. 37a. As a result, Eastern canceled all but a small portion of its flights and filed for bankruptcy five days later. App. 37a-38a. After Eastern attempted to persuade the strikers to return to work and sought an injunction

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[2] *National Airlines, Inc. v. International Ass'n of Machinists & Aerospace Workers*, 430 F.2d 957 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971) ("*National II*"); *Air Line Pilots Ass'n Int'l v. United Air Lines, Inc.*, 616 F. Supp. 849 (N.D. Ill.), *amending*, 614 F. Supp. 1020 (N.D. Ill. 1985), *rev'd in part on other grounds*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987) ("*United*").

against the strike, Eastern began, as a last resort, recruiting experienced replacement pilots on March 21, 1989. App. 38a, 46a.

For the first several days, Eastern departed from its longstanding practice of treating new hire pilots immediately as permanent employees and told recruits that they would not be permanent employees until they completed training. App. 47a n.31, 57a. Because it soon became clear that Eastern could not attract enough recruits on those terms, Eastern stated on March 27, 1989 and thereafter in recruiting materials and employment offers that Eastern would employ new hire pilots as permanent replacements and that they would be guaranteed permanent pilot positions if they accepted Eastern's offer of employment. *See* App. 49a, 57a-58a.

Eastern hired 1,223 replacement pilots during the strike; the replacements held airline transport or commercial pilot licenses and averaged 5,700 hours of flight experience with smaller carriers. App. 37a, 40a n.20, 52a. The uncontradicted evidence is that Eastern would have been unable to attract sufficient qualified replacement pilots to operate without promising them permanent employment from their first day of training.[3] App. 49a-50a, 52a-53a, 58a.

Eastern treated the replacements at issue identically to all other Eastern pilots hired during the 25 years preceding ALPA's strike. *See* 43a-46a. As of

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[3] Eastern submitted to the District Court over 70 declarations from replacement pilots stating specifically that they would not have left their prior jobs to join Eastern unless they were treated as permanent replacements from the first day of training. ALPA did not submit any evidence contradicting these declarations.

their first day of training, the replacements came on Eastern's payroll, received Eastern seniority numbers and Eastern dates of hire, had all applicable employment taxes paid, and began active "service" under the Eastern-ALPA collective bargaining agreement used to calculate vacation, sick leave, pension and other benefits. *Id.*

A small number of Eastern pilots initially crossed ALPA's picket line. App. 36a, 37a. Thereafter, Eastern's pilot positions were also filled by returning strikers and replacements. *Id.* Both the returning strikers and replacements had to complete training or retraining required by the Federal Aviation Administration ("FAA"), under Eastern's supervision and control. App. 39a, 40a-42a, 53a-54a. Eastern assigned replacements to specific positions and aircraft, and trained them in a program that lasted for at least eight weeks—a longer period than normal because Eastern's limited training facilities were fully taxed due to the need to train such a large number of pilots. App. 40a-41a.

As Eastern's efforts to recruit and train replacements became more successful in the summer of 1989, and as Eastern was beginning to restore its scheduled service, the solidarity of the striking pilots began to wane. *See* App. 38a-39a. In early August 1989, several hundred strikers offered to return to work. App. 39a. Eastern immediately brought these pilots back to work and retrained them ahead of replacements who were awaiting training. App. 39a-40a. On August 11, 1989, Eastern determined that it had enough pilots (replacements and returning strikers) to restore its full operations. *See* App. 3a, 39a. Thus, on that day,

Eastern immediately stopped hiring replacements and announced that no positions were available to any additional strikers seeking to return to work, but that they would be recalled as positions became available in the order in which they offered to return to work. *Id.*

ALPA's strike continued for three more months, finally ending on November 22, 1989, when ALPA offered, on behalf of the remaining strikers, to return to work. *Id.* Because Eastern had accelerated the retraining of returning strikers, approximately 227 replacement pilots were still in training when ALPA's strike ended. App. 3a, 39a. The Eleventh Circuit's decision holds Eastern liable for not laying off the 227 replacements to create vacancies for the strikers to fill, although Eastern previously guaranteed permanent employment to the replacements.[4] App. 3a, 18a.

If Eastern had laid off the 227 replacements, each returning striker would have had to complete up to 30 days of retraining, including full upgrade and transition training for new positions, because the replacements did not hold the same positions that the senior strikers vacated. App. 53a-54a. This retraining would have taken several months, and Eastern would have

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[4] The Eleventh Circuit's decision goes even further. Aside from the 227 replacements, other replacements had not completed their initial operating experience ("IOE"), which consists of 10-25 hours of flying on regular revenue flights after a pilot finishes all ground and flight training. *See* App. 42a n.25. The Eleventh Circuit also found that IOE was part of Eastern's training program and effectively holds Eastern liable for declining to lay off the replacements who had not completed IOE by the strike's end. *See* App. 12a n.5.

had to cancel hundreds of flights in the meantime for two reasons. App. 54a. First, the strikers could not have completed their required retraining in time to staff Eastern's scheduled flights. *Id.* Second, replacements would have quit because of their impending furlough. *Id.*

B. The Decision Below

The Eleventh Circuit's two-to-one decision establishes a new *per se* rule: new hire pilots who do not complete training before a strike ends are not permanent replacements, even if, as here, they accepted permanent employment, specific job assignments and pay. App. 1a-2a, 12a-15a. The decision does not address Eastern's legitimate and substantial business justification that Eastern was only able to continue operating during the strike by offering recruits permanent employment from the outset of training.

Rather, the decision finds that a new hire pilot does not meet the RLA's definition of "employee" before completing training[5] and, therefore, a new hire pilot is not a permanent replacement until after he or she

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[5] The RLA defines "employee" as:

> "[E]very person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect. . . ."

45 U.S.C. § 151, Fifth. The RLA specifically covers "every air pilot or other person who performs any work as an employee or subordinate official of [a] carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service." 45 U.S.C. § 181.

completes training. App. 9a-10a, 14a. The Eleventh Circuit avoids the offer and acceptance test used by the Fifth Circuit in *National II* for determining whether an airline may treat a new hire as a permanent replacement. App. 15a-17a. The decision holds that because Eastern's replacements in training were not "employees" under the RLA, Eastern should have laid them off when the strike ended to create vacancies for strikers. App. 14a, 17a.

Accordingly, the Eleventh Circuit affirmed the District Court, which pursuant to its jurisdiction under 28 U.S.C. §§ 1331, 1337(a), and the RLA granted ALPA's motions for summary judgment on its claims on behalf of the strikers for damages and for a preliminary injunction. App. 19a, 29a. The Eleventh Circuit remanded to the District Court the subsidiary question of the precise number of strikers that Eastern should have reinstated. App. 18-19a.

The Eleventh Circuit reached this result even though an airline's right to hire permanent replacements does not stem from the RLA's provisions governing employment in general, but rather comes from an employer's inherent right to continue its business during a strike. *See Mackay*, 304 U.S. at 345. *See also NLRB v. Cutting, Inc.*, 701 F.2d 659, 662 (7th Cir. 1983). The decision considers only whether the replacements in training were "employees" within the meaning of the RLA to decide if they actually occupied the strikers' jobs before the strike ended, under *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967).[6] App. 6a-7a, 12a-15a.

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[6] The Eleventh Circuit's decision also relies on dicta in *NLRB v. Erie Resistor*, 373 U.S. 221, 232 (1963). *See* App. 7a. *Erie*

The Eleventh Circuit's decision ignores *Fleetwood Trailer*'s statement that the occupying of strikers' jobs by replacements is merely *one* legitimate and substantial business justification that supports an employer's refusal to reinstate strikers.[7] Thus, the decision does not consider the sufficiency of Eastern's justification that Eastern had to offer replacements permanent employment from the first day of training to attract enough replacements to avoid shutting down during the strike.

REASONS FOR GRANTING THE WRIT

A. The Circuits Are Split On The Important Issue Of Federal Labor Law Raised In This Case

The Eleventh Circuit's decision conflicts with *National II* (Fifth Circuit) and *United* (the Northern District of Illinois). This Court should resolve this conflict so that employers and unions can negotiate and operate in full knowledge of the law concerning striker replacements.

Resistor involved an employer's grant of super-seniority to crossovers and replacements. By contrast, Eastern did not disturb its seniority list. Returning strikers maintained their seniority and did not lose accrued seniority during the strike. The employer in *Erie Resistor* was found to have acted in a manner that was inherently destructive of union membership based upon detailed factual findings not made here.

[7] *Fleetwood Trailer* states:

> "In some situations, 'legitimate and substantial business justifications' for refusing to reinstate striking employees who engaged in an economic strike, have been recognized. One is when jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations."

389 U.S. at 379.

1. *National II* And *United* Support Eastern's Position

In *National II*, the Fifth Circuit established a two-step test to determine whether 67 replacements were permanent replacements by the strike's end. 430 F.2d at 961. First, in deciding when a replacement is hired:

> "[T]he critical time is when the arrangements with the replacement worker have become fixed and irrevocable. Thus, if the employer has the intention to bind itself to a firm contract of employment, and the employee has accepted a specific job assignment, the replacement is 'hired' even though subsequently he may be divested of his job for failure to pass medical or security clearance."

Id. (citation omitted). Second, the replacement must thereafter "actually com[e] on the payroll." *Id.*

Eastern's replacements met this test. Before the strike ended, they accepted offers of permanent employment and specific job assignments, and they had come on Eastern's payroll.

The Eleventh Circuit majority dismisses these facts by declaring that replacements in training did not have "fixed and irrevocable" employment.[8] App. 16a.

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[8] In adopting the "fixed and irrevocable" language, the Fifth Circuit in *National II* was following the Fourth Circuit in *International Ass'n of Machinists, Lodge 1652 v. International Aircraft Services, Inc.*, 302 F.2d 808, 812 (4th Cir. 1962) ("*IAM*"). *See National II*, 430 F.2d at 961. In *IAM*, the Fourth Circuit held that if the employer "bound itself irrevocably by contracts of employment made with replacement employees some time before they went to work," the replacements were hired before the strike ended. 302 F.2d at 812. The Fourth Circuit directed the district court to "ascertain when the new employees had

Their employment was, however, "fixed and irrevocable" as defined in *National II* (acceptance of permanent employment and a specific job assignment) and under state contract law. *See Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) ("*Belknap*").

The decision also attempts to distinguish *National II* on two other grounds, each of which is unavailing. First, the decision notes that *National II* did not involve replacements who had to pass a training program. App. 16a. But, *National II* did involve 63 replacements who had not even reported to the airline, a far cry from Eastern's replacements who had all begun training on Eastern's payroll before ALPA's strike ended.[9] Just because this case involved pilots (for whom training is required) while *National II* involved mechanics is no reason to reject *National II*'s binding offer and acceptance test.

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payroll status and what, if any, enforceable legal obligations the company incurred in its arrangements with them." *Id.* at 813. Eastern's replacements in training clearly met the Fourth Circuit's test, having accepted firm offers of permanent employment and acquired payroll status before ALPA's strike ended.

[9] Accordingly, even though National's replacements were "not actually performing the work ordinarily discharged by the former strikers" (App. 13a), *National II* held that they were permanent replacements if they had accepted permanent employment and specific job assignments, and came on National's payroll. Thus, a factor critical to the Eleventh Circuit majority (App. 13a) is irrelevant under *National II*. The Eleventh Circuit's decision also overemphasizes pilot training in singling out the replacements as "unqualified." Neither the replacements *nor* the strikers were immediately "qualified to perform the work Eastern's pilots ordinarily discharged." App. 12a. Eastern's operations would have been curtailed and disrupted while strikers completed retraining. *See* App. 54a.

Second, the decision labels medical and security clearance as mere "technicalities" as compared to training. App. 16a. There is no basis in law or the record for this "distinction" as Circuit Judge Anderson pointed out in his dissent; all three are requirements that pilots must fulfill after they accept permanent employment.[10] App. 19a. Eastern's new hires were permanent replacements when they met *National II*'s standard, without regard to whether they had satisfied training, medical, or security clearance requirements.

United also supports Eastern here. In *United*, Judge Bua of the Northern District of Illinois held that 539 United new hire pilots who accepted offers of permanent employment, including 114 new hires who did not even begin training during the strike, were permanent replacements. 616 F. Supp. at 851 ("Permanent replacements hired from outside the company, unlike striking pilots who cross over, need not actually begin working in order to retain their jobs following the conclusion of a strike."). *A fortiori*, Eastern's new hires, who all began training during the strike, were permanent replacements. The Eleventh Circuit's decision does not even address the significant *United* district court decision.[11]

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[10] For instance, the FAA regulates pilot training, medical clearance, and airline security. 14 C.F.R. Parts 121, 67, 108.

[11] The Seventh Circuit reversed a prior decision in the same case on a different issue. *See Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc.*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987). The Seventh Circuit held that a different group of 500 new hires (the "Group of 500") who did *not* accept offers of permanent employment and, with a few exceptions, never came to work were not "employees" within the RLA's

2. The Eighth Circuit's *Trans World* Decision Is Distinguishable And Wrong

The Eleventh Circuit followed the Eighth Circuit's *Trans World* decision, 819 F.2d 839 (8th Cir. 1987) *rev'd in part on other grounds*, 489 U.S. 426 (1989). App. 10a-11a, 12a.[12] That decision, which involved TWA's hiring of replacement flight attendants during a strike, is inapposite. TWA never offered employment to flight attendants before they completed training (for which they paid tuition) except *after* the strike began. 819 F.2d at 841 n.2. By contrast, Eastern treated the replacements at issue exactly as it treated all new hire pilots for the 25 years *before* ALPA's strike began.

The Eighth Circuit's decision is wrong because it confuses whether an airline may refuse to lay off new hires because the airline, out of necessity, offered them permanent employment, with the separate and distinct question of whether new hires qualify as RLA "employees" to assert claims under the RLA against their employer. An airline seeking to operate during

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definition, and ALPA could not succeed on a claim on behalf of the Group of 500 against United for violating the RLA. 802 F.2d at 892-93. The Group of 500 would not have been permanent replacements under *National II* or under Judge Bua's subsequent decision in any event; they received only expense reimbursements rather than salary and signed agreements providing that they would not be employees during training. The Group of 500 were very different from Eastern's replacements and United's 539 other new hires.

[12] The Eleventh Circuit also relied on the Seventh Circuit's *United* decision (App. 11a, 12a), which held that ALPA could not assert RLA claims on behalf of the Group of 500, who had expressly agreed that they were not permanent employees during training. That decision is plainly inapposite. *See* n. 11, *supra*.

a strike, as it is entitled to do under *Mackay*, must recruit and hire replacements without knowing when the strike will end. *See* Westfall, *Striker Replacements and Employee Freedom of Choice*, 7 Lab. Lawyer 137, 146 (1991) ("The *Mackay* doctrine allows each side to a bargaining dispute, in effect, to 'test the market' by seeking and using alternative sources of labor and employment, respectively."). Eastern's offers of permanent employment to potential new hires were wholly necessary in that context.

RLA "employee" status is very different. It does not depend upon or arise *ipso facto* from a strike. Because Eastern voluntarily extended the terms of its collective bargaining agreement to the new hires (creating obligations under state contract law as established in *Belknap*), it was academic whether the new hires could someday assert claims as RLA "employees."[13] Indeed, under *National II*, permanent replacements acquire that status when hired, before they are "employees" under any definition, statutory or otherwise. This Court should grant this Petition and reject the Eighth Circuit's analysis in *Trans World*, which focuses on an irrelevant and esoteric question.

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[13] In fact, the Eleventh Circuit's answer to this irrelevant question was itself wrong because Eastern's replacements in training were subject to Eastern's supervision and control, and required attendance in training does constitute work. *See* App. 41a. Indeed, during IOE (which is training according to the Eleventh Circuit), new hires piloted Eastern revenue flights. *See* App. 42a, 12a-13a.

B. The Eleventh Circuit's Decision Violates The Precepts Set Forth By This Court In Its *Trans World* Decision

The Eleventh Circuit's decision conflicts with this Court's decision in *Trans World* both by substantially narrowing the RLA right of self-help and in doing so by implying a new limitation on that right.

1. Contrary To This Court's Decision In *Trans World*, The Eleventh Circuit Makes Self-Help More Limited Under The RLA Than The NLRA

This Court reiterated in *Trans World* the fundamental principle that the RLA "provide[s] greater avenues of self-help" than the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* *Trans World*, 489 U.S. at 438 (*citing Burlington Northern R. Co. v. Maintenance of Way Employees*, 481 U.S. 429, 444 (1987); *Brotherhood of R.R. Trainmen v. Jacksonville Terminal*, 394 U.S. 369, 391-92 (1969)). The Eleventh Circuit's decision vitiates this Supreme Court doctrine. The decision makes the right of RLA employers to hire permanent replacements during a strike much *narrower* than the corresponding NLRA right. Numerous cases decided under the NLRA hold, contrary to the Eleventh Circuit's decision here, that new hires become permanent replacements when hired, without regard to their need for training or their beginning work after the strike ended.[14]

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[14] *E.g.*, *Newberry Energy Corp.*, 227 N.L.R.B. 436, 437 (1976) ("The Board has uniformly held that where an employer makes a commitment to an applicant for a striker's job it will normally regard that commitment as a legitimate replacement even though the striker requests reinstatement before the replacement actually begins to work.") (footnote omitted); *Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 804 (1964) ("And under established Board

Recently, the National Labor Relations Board ("NLRB") reaffirmed this holding and rejected the Eleventh Circuit's view in *Solar Turbines, Inc.*, 302 N.L.R.B. No. 3, slip op. (March 11, 1991) ("*Solar Turbines*"). The NLRB ruled that 39 new hires who had not taken (much less, passed) a preemployment drug and alcohol test or begun work before the strike ended were permanent replacements for strikers because of the employer's "clear commitment to hire them as permanent replacements." *Id.* at 5. *Solar Turbines* holds that replacements fill strikers' jobs "as of the time the putative replacements accept an employer's offers of permanent employment in the strikers' jobs," even if the replacements actually began work after the strike ended. *Id.* at 3. By contrast, the Eleventh Circuit disregarded Eastern's clear commitment to the new hires that Eastern would hire them as permanent replacements and held that East-

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precedent the fact that replacements lacked experience and required some training, and that some did not remain permanently in Respondent's employ, does not detract from Respondent's intent at the time of hiring that the replacement become the permanent replacements of the strikers. Accordingly, we find that Respondent intended to, and did in fact, hire permanent replacements for the strikers.") (footnote omitted); *Anderson, Clayton & Co.*, 120 N.L.R.B. 1208, 1214 (1958) ("The replacements admittedly were totally inexperienced and without known aptitudes or fitness for the jobs to which they had been assigned, jobs which require training estimated at 1 to 4 months or so .... Despite all these matters, ... and the fact that six of the so-called permanent replacements had only received their assignment to these positions prior to the conclusion of the strike and entered upon their duties only after the conclusion of the strike ... the employer had the right during the pendency of the strike to assign anyone it cared to work permanently on these jobs and that such assignments must be considered as permanent replacements.").

ern's new hires did *not* fill the strikers' jobs as of the time the new hires accepted Eastern's offers of permanent employment. App. 14a-15a.

In addition, *Solar Turbines* rejects the Eleventh Circuit's focus on whether new hires met the statutory definition of "employee" to decide whether an employer hired permanent replacements before the strike ended.[15] The NLRB finds that irrespective of whether the new hires were statutory "employees" before the strike ended for purposes of collective bargaining, the employer could treat the new hires as permanent replacements for strikers if the employer hired them on that basis:

> "The question before us here is not whether the Respondent was required to bargain with the Union before administering the drug and alcohol tests to the putative replacements. Rather, the question is whether the hiring commitment made to *prospective* employees was sufficient to effect the permanent replacement of strikers."

Id. at 4 n.3 (emphasis added).

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[15] The NLRB relied on this Court's decision in *Belknap*, which states as follows:

> "That the offer and promise of permanent employment are conditional does not render the hiring any less permanent if the conditions do not come to pass. All hirings are to some extent conditional."

463 U.S. at 504 n.8, (*quoted* in *Solar Turbines*, slip op. at 6). Thus, even though Eastern's new hires had to complete training to fly for Eastern, they were still permanent replacements both under *Belknap* and *Solar Turbines*, contrary to the Eleventh Circuit's view.

Eastern's new hire pilots at issue here were permanent replacements under *Solar Turbines*' analysis, even though that decision was issued in an NLRA case. Thus, the Eleventh Circuit's decision violates the fundamental principle reiterated by this Court in *Trans World*. The Eleventh Circuit substantially narrowed the RLA right to hire permanent replacements as compared to the right as construed in NLRA cases such as *Solar Turbines*, and the hiring of permanent replacements is a critical component of an employer's right under either statute to use self-help. The Eleventh Circuit's result is backwards; this Court held in *Trans World* that the RLA permits greater, not lesser, avenues of self-help as compared to the NLRA.

2. Contrary To This Court's Decision In *Trans World*, The Eleventh Circuit Implies A New Limitation On The RLA Right Of Self-Help

The Eleventh Circuit's decision also conflicts with *Trans World*'s admonition not to imply new limitations on the RLA right of self-help. In *Trans World*, this Court stated:

> "[W]e should hesitate to imply limitations on all but those forms of [RLA] self-help that strike a fundamental blow to union or employer activity and the collective bargaining process itself."

489 U.S. at 442.[16]

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[16] Unlike the more typical situation involving the use of RLA self-help, Eastern and ALPA had not exhausted the RLA's bargaining processes when ALPA began its strike. ALPA claimed that it went on strike in sympathy with the International Association of Machinists' strike against Eastern, which also began on March 4, 1989. *See Eastern Air Lines, Inc. v. Air Line Pilots*

The Eleventh Circuit's decision implies a new limitation on RLA carriers' use of self-help by severely constraining airlines' ability to recruit replacement pilots, even though the RLA does not impose any such constraint. The Eleventh Circuit's decision justifies this result by finding conclusorily that "Eastern's treatment of the returning pilots strikes a fundamental blow to the union and collective bargaining process." App. 18a. The decision goes so far as to find that Eastern did not promote a purpose of the RLA set forth in 45 U.S.C. § 151a by not "avoid[ing] any interruption to commerce or to the operation of any carrier engaged therein." App. 17a.

The facts are to the contrary. Eastern treated the returning strikers and the replacements precisely the same. Eastern deemed them all permanent employees from their first day of training. This treatment did not strike a fundamental blow to ALPA in the 25 years preceding the strike. Moreover, Eastern did not abuse its *Mackay* right during ALPA's strike. Eastern stopped hiring replacements as soon as Eastern satisfied its need for additional pilots, three months before the strike ended. App. 3a, 39a. *Cf. Fleetwood Trailer*, 389 U.S. at 379 (alleged replacements *hired two months after* strike ended). Indeed, were it not for Eastern's promise to recruits that Eastern would treat them as permanent employees from the first day of training, Eastern would not have had sufficient

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Ass'n, Int'l, 710 F. Supp. 1342 (S.D. Fla.), *aff'd*, No. 89-5229 (11th Cir. June 7, 1989). From a carrier's standpoint, the need for self-help is the same whether it faces a primary strike or a sympathy strike: "to carry on the business." *Mackay*, 304 U.S. at 345.

replacement pilots to fly its full schedule. App. 49a-50a, 52a, 58a.

The law is also to the contrary. Other employers, including United Air Lines and National Airlines, lawfully declined to reinstate strikers because their positions were filled by replacements who had not completed training or otherwise not begun work when the strike ended, provided that the replacements had accepted offers of permanent employment by then. *National II*, 430 F.2d at 961 (63 replacements not even on National's premises at strike's end); *United*, 616 F. Supp. at 851 (114 replacements had not begun training by strike's end). *See also Solar Turbines*, slip op. at 5-7 (replacements had merely been assigned job classifications, work departments and employee badge numbers before strike ended); *Kurz-Kasch, Inc.*, 286 N.L.R.B. 1343, 1360 (1987), *remanded on other grounds*, 865 F.2d 757 (6th Cir. 1989) (replacements started work *one month after* strike ended because employer could not train them earlier); *Home Insulation Services*, 255 N.L.R.B. 311, 312 n.9 (1981), *enforced*, 665 F.2d 352 (11th Cir. 1982) (rejecting argument that replacements who accepted permanent employment, but did not report to work before strike ended were not permanent replacements); *Southwest Engraving Co.*, 198 N.L.R.B. 694, 695 (1972) (replacement began work *two months after* strike ended); *Anderson, Clayton & Co.*, 120 N.L.R.B. at 1214 (replacements merely received assignments before strike ended, needed *one to four months* of training, and began work after strike ended).

This Court should review the Eleventh Circuit's decision because it is at odds with this Court's decision in *Trans World*.

C. The Eleventh Circuit's Decision Destroys An Airline's Right Under *Mackay* To Continue Operating During A Pilot Strike By Hiring Permanent Replacements

If the Eleventh Circuit's decision remains intact, airlines will be unable to use their *Mackay* right during future pilot strikes for at least two reasons. First, the record here shows that pilot recruits will not leave their existing jobs to become replacements subject to layoff if they do not complete several weeks of training before the strike ends. *See* App. 49a-50a, 52a, 58a. Because potential replacements do not know when a strike might end, the decision creates an untenable risk in the eyes of recruits that airlines may have to layoff replacements.

Under the Eleventh Circuit's decision, an airline can only hire replacements who are temporary, not permanent, at least until they complete training. This radical change will make it much harder for airlines to recruit replacements, as Eastern's experience proves. Airlines will not have enough replacements to operate during strikes, and the travelling public will suffer as a result.[17]

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[17] ALPA speculated below that Eastern could have emulated United with the Group of 500 and pre-trained an entire work force of replacements before the strike began. Eastern, a carrier in financial extremis, certainly could not have afforded to maintain two pilot work forces. *See Air Line Pilots Ass'n, Int'l v. Eastern Air Lines, Inc.*, 863 F.2d 891 (D.C. Cir. 1988), *reh'g en banc denied*, 863 F.2d 913 (D.C. Cir. 1989) (Eastern lost $1 billion from 1980 to 1988). The pre-training of an entire body of replacements is also much more draconian than Eastern's conduct, which enabled hundreds of strikers to return to work. ALPA also suggested disingenuously that Eastern could have

Second, even if an airline could recruit new hires on contingent terms, the union could easily oust them. The union need only dribble strikers back to work equal in number to each class of new hires as it completes training and prepares to embark on IOE. The airline could not operate while the cross-overs completed retraining, and the bulk of the strikers could stay out indefinitely without any risk of being permanently replaced.

This Court has repeatedly reaffirmed *Mackay*. *Trans World*, 489 U.S. at 433; *Belknap*, 463 U.S. at 504 n.8; *Fleetwood Trailer*, 389 U.S. at 379; *Erie Resistor*, 373 U.S. at 221. This Court should review the Eleventh Circuit's decision to prevent *Mackay* from becoming a nullity during future airline strikes.

D. The Eleventh Circuit's Decision Ignores The Hiring Needs Of Airlines Attempting To Fulfill Their Statutory Obligation To Operate During Pilot Strikes

The uncontradicted evidence before the Eleventh Circuit was that Eastern could not recruit enough replacement pilots to operate during ALPA's strike by offering them employment contingent on their completion of training. *See* App. 49a-50a, 58a. Nevertheless, the Eleventh Circuit held that the very employment terms that Eastern tried and found inadequate to attract replacements are the only terms that Eastern could have lawfully used.

As even the Eleventh Circuit concedes in conclusory fashion, the law is that strikers need not be reinstated if an employer has a legitimate and substantial busi-

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entered into additional subcontracts with Continental Airlines, a practice for which ALPA sued Eastern in another case. *See In re Ionosphere Clubs, Inc.*, 922 F.2d 984 (2d Cir. 1990).

ness justification. *Fleetwood Trailer*, 389 U.S. at 379. The Eleventh Circuit did not, however, recognize that Eastern, as a carrier subject to the RLA, had a "duty to make all reasonable efforts to continue its operations during a strike . . . " *Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 247 (1966). Eastern tried to recruit a sufficient number of replacements based upon the terms ultimately mandated by the Eleventh Circuit, but could not do so. It was certainly reasonable for Eastern to fulfill its duty to continue flying by reverting to its 25 year practice of offering permanent employment from the first day of training.

The Eleventh Circuit did not even consider whether this justification was sufficient. In light of the substantial risk that other airlines will have to shut down during future strikes given Eastern's proven inability to recruit sufficient replacements on the Eleventh Circuit's terms, this Court should set this matter for plenary consideration.

CONCLUSION

This case is critical to the airline and railroad industries. The Eleventh Circuit's decision itself states that the issue at stake has never been decided by this Court. App. 9a. The decision threatens the well-established rights of an employer to hire permanent replacements for strikers and to operate during a strike. Eastern's estate faces tens of millions of dollars in claims, and the decision endangers airlines in future strikes. This Court should review such a far-reaching and ill-advised decision.

For the foregoing reasons, Eastern Air Lines, Inc. respectfully requests that the Court grant this Petition.

Respectfully submitted,

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Dated: June 12, 1991

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 90-5658

D.C. Docket No. 89-1630-Civ-EBD

EASTERN AIR LINES, INC.,

Plaintiff-Counterclaim
Defendant-Appellant,

versus

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, EASTERN AIR LINES MASTER EXECUTIVE COUNCIL,

Defendants-Counterclaim
Plaintiffs-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(December 20, 1990)

Before HATCHETT, and ANDERSON, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

HATCHETT, Circuit Judge:

In this expedited case, we affirm the district court's ruling that Eastern Air Lines, Inc. (Eastern) is obligated

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

under the Railway Labor Act to reinstate returning pilot-strikers prior to awarding pilot positions to new hire pilots who, at the time the pilot-strikers unconditionally offered to return to work, had not successfully completed Eastern's training program and had not started flying regular revenue flights.

FACTS

On March 4, 1989, the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), which is the collective bargaining representative for mechanics and ground service employees at Eastern, initiated a strike against Eastern. On the same day, the Air Line Pilots Association, International (ALPA), which is the collective bargaining representative for Eastern's pilots, and the Eastern pilot group decided to honor the IAM's picket lines by engaging in a sympathy strike.

Shortly after the strike commenced, Eastern began hiring and training new pilots to fill vacant positions caused by the strike. For at least the first ten days of this hiring process, Eastern told prospective new hire pilots that they would become Eastern employees and assume permanent status upon completion of their training. Subsequently, Eastern informed new hire pilots that they would be considered permanent replacements for Eastern's striking pilots on the first day of training.

Eastern periodically entered the new recruits into the pilot training program which it administered under Federal Aviation Administration (FAA) guidelines. The training program lasted at least eight weeks (but in some cases took as long as four months), and included ground school instruction, oral and written examinations, and extensive use of sophisticated cockpit and flight simulators. *See generally* 14 C.F.R. §§ 121.403-09, 121.424, 121.433 (1990). New hire pilots were also required to complete between ten to twenty-five hours of operating experience on the

type of aircraft for which they had been trained. This operating experience, called Initial Operating Experience (IOE), must be performed on Eastern aircraft under the supervision of a "check pilot." *See* 14 C.F.R. § 121.434 (1990). Under FAA requirements, Eastern's pilot trainees must pass: (1) an FAA-administered examination after completing ground school; (2) an FAA-administered simulator test; and (3) an FAA-administered check ride at the conclusion of IOE. If the trainee successfully completes each of these requirements, the FAA issues a certificate which permits the trainee to fly regular revenue flights under Eastern's supervision and authority.

By early August of 1989, many of Eastern's striking pilots had made unconditional offers to return to work. On August 11, 1989, Eastern publicly stated that no pilot positions were available to former strikers. Instead, Eastern announced that strikers wishing to return to work would be placed on inactive status on a preferential recall list for future pilot positions as they became available. As of August 11, 1989, a significant number of new hire replacement pilots were still in training.

On November 22, 1989, the ALPA terminated the pilot strike and notified Eastern that all former strikers were immediately and unconditionally available to return to work. As of that date, at least 227 new hire replacement pilots remained in training.[1] From at least early August, 1989, until August 2, 1990, when the district court granted ALPA's motion for a preliminary injunction, Eastern filled vacant pilot positions by giving preference to its new hire pilots, rather than Eastern's striking pilots who had unconditionally offered to return to service.

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[1] Eastern maintains that 227 new-hire pilots remained in training as of November 22, 1989, while ALPA contends that at least 250 replacement pilots remained in training as of that date.

PROCEDURAL HISTORY

On August 11, 1989, Eastern filed this action against ALPA seeking a declaratory judgment under the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188, declaring that its "new hire pilots in training are permanent replacements who may not be deprived of active employment by strikers who have offered to return to work but have not yet been reinstated." ALPA counterclaimed requesting injunctive, declaratory, and monetary relief under the RLA. By its counterclaim, ALPA sought to vindicate its rights and the rights of former strikers against "Eastern's refusal to reinstate former strikers to Eastern pilot positions by treating non-employee 'trainees' as permanent replacements." Both Eastern and ALPA filed motions for summary judgment. ALPA also moved for preliminary injunctive relief under Count I of its counterclaims.

The district court entered summary judgment for ALPA and denied Eastern's request for summary judgment. Further, the district court granted ALPA's motion for preliminary injunctive relief under Count I of its counterclaims, (1) enjoining Eastern from treating its trainees as permanent replacements, or awarding trainees pilot positions ahead of former striking pilots who unconditionally returned to work, (2) ordering reinstatement for each former striking pilot prior to awarding pilot positions to new hire pilots who remained trainees as of November 22, 1989, and (3) enjoining displacement of striking pilots by new hire pilots who remained trainees as of November 22, 1989. ALPA's motion for preliminary injunctive relief defined trainees as "new hire pilot recruits who have not completed new hire pilot training—including Initial Operating Experience training flights and the receipt of a final Federal Aviation Administration . . . release to perform Eastern pilot services—and have not flown their initial, FAA-authorized Eastern revenue flight."

CONTENTIONS

Eastern contends that the district court erroneously ruled that the RLA requires it to displace its newly hired trainee pilots and reinstate former striking pilots to available Eastern pilot positions. According to Eastern, its new hire pilots who were still in training when the strike ended, were permanent employees. Consequently, Eastern argues that under striker replacement law, the returning strikers are not entitled to displace these permanent replacement pilots. Further, Eastern contends that the district court's preliminary injunction is impermissibly vague. Fed. R. Civ. P. 65(d).

ALPA contends that the district court properly granted summary judgment because Eastern violated the RLA by refusing to reinstate returning strikers prior to awarding pilot positions to pilot trainees. Pilot trainees are not "permanent replacements" under the RLA, ALPA argues, until they fully complete training and operate their post-IOE initial revenue flight. Moreover, ALPA contends that the district court's preliminary injunction satisfies the requirements of Fed. R. Civ. P. 65(d).

ISSUE

The sole issue in this case is whether the district court correctly determined that the RLA requires Eastern to reinstate former striking pilots prior to awarding pilot positions to new hire pilots in training.[2]

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[2] In its brief, Eastern contends that the issue is: "Whether a bankrupt airline such as Eastern may treat new hire pilots as permanent replacements for striking pilots from their first day of training. . . ." Eastern's status as a bankrupt airline is of little legal significance in determining whether it is obligated under the RLA to reinstate returning pilots.

DISCUSSION

A. Standard of Review

Our review of the district court's grant of summary judgment "is plenary, and we must apply the same legal standards used by the district court." *Fernandes v. Bankers National Life Ins. Co.*, 906 F.2d 559, 564 (11th Cir. 1990). "We will affirm the district court if, after construing the evidence in the light most favorable to the nonmoving party, we find that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *William Penn Life Ins. Co. of New York v. Sands*, 912 F.2d 1359, 1361 (11th Cir. 1990). Further, we review the district court's grant of a preliminary injunction only for an abuse of discretion. *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir. 1985).

B. The Railway Labor Act and Reinstatement Rights

Under the RLA, airline employees remain statutory employees of the carrier during a strike unless they secure other work. *See Independent Fed'n of Flight Attendants v. Trans World Airlines, Inc.*, 819 F.2d 839, 842 (8th Cir. 1987) (*Trans World*), *rev'd on other grounds*, 103 L. Ed. 2d 456 (1989); *cf. NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378-79 (1967) (*Fleetwood Trailer*). Consequently, an employer's refusal to reinstate former strikers after an economic strike constitutes an unfair labor practice unless the employer can prove that the failure to reinstate is based upon "legitimate and substantial business justifications." *See Fleetwood Trailer*, 389 U.S. at 378-79 (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967)).

Where, for instance, an employer hires permanent replacement employees during an economic strike to continue operations, and refuses to discharge the permanent replacements in order to make room for returning strikers, the Supreme Court has found the employer's decision to

be supported by a legitimate and substantial business justification. *See NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938) (*Mackay*); *Fleetwood Trailer*, 389 U.S. at 379 (an employer has "legitimate and substantial business justifications" for refusal to reinstate when "the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations"); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 232 (1963) (*Erie Resistor*) (under *Mackay*, "an employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers."). Under these circumstances, the employer's legitimate interest in continuing operations is "deemed to outweigh the damage to concerted activities caused by permanently replacing strikers." *Erie Resistor*, 373 U.S. at 232. Although this exception, referred to as the *Mackay* exception, is firmly rooted in striker replacement doctrine, "[c]ourts have been reluctant to extend" it. *Trans World*, 819 F.2d at 846 (citing *Erie Resistor*, 373 U.S. at 232; *International Ass'n of Machinists and Aerospace Workers v. J.L. Clark Co.*, 471 F.2d 694, 698 (7th Cir. 1972)).[3]

C. District Court's Ruling

The district court began its analysis by noting that "[n]o authority binding on this court has directly addressed the

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[3] Though the courts have developed much of this striker-replacement doctrine in the context of the National Labor Relations Act (NLRA), the Supreme Court in Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants, 103 L. Ed. 2d 456, 465 (1989), observed "that carefully drawn analogies from the federal common labor law developed under the NLRA may be helpful in deciding cases under the RLA." The Supreme Court cautioned, however, that "the NLRA 'cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes.' " *Trans World*, 103 L. Ed. 2d at 469 (quoting Trainmen v. Jacksonville Terminal, 394 U.S. 369, 383 (1969)).

issue of whether replacements still in training at the time a strike is called off may be accorded permanent replacement status." The district court defined trainees as "new hire pilots who were still in training, and who had not yet begun flying regular revenue flights . . . when the ALPA pilots made unconditional offers to return to work."

In the absence of binding authority, the district court followed *Trans World*, 819 F.2d at 845-47, *cert. denied in rel. part*, 485 U.S. 958 (1988), and *Air Line Pilots Ass'n. Intern. v. United Air Lines, Inc.*, 302 F.2d 886 (7th Cir. 1986) (*United Air Lines*), *cert. denied*, 480 U.S. 946 (1987), and held that "[t]o the extent that the pilot trainees in the instant case had not performed the work ordinarily discharged by the striking pilots, the trainees were not employees protected by the RLA." Further, the district court found that although Eastern "had a legitimate and substantial business justification to replace striking pilots with replacement pilots who could promptly assume the requisite duties and responsibilities of striking pilots, the same does not hold true with regard to trainees." Based upon these findings, the district court concluded that "the *Mackay* balance weighs in favor of reinstating the striking pilots in place of the trainees."

In this court, Eastern argues that, contrary to the district court's conclusion, its trainee pilots are permanent replacement employees, and that it is not, therefore, obligated to reinstate returning strikers. According to Eastern, this case is controlled by *National Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers*, 416 F.2d 998 (5th Cir. 1969) (*National I*), *appeal after remand*, 430 F.2d 957 (5th Cir. 1970) (*National II*), *cert. denied*, 400 U.S. 992 (1971). In response, ALPA argues (1) that returning pilots are entitled to displace pilot trainees because the trainees are not yet "permanent employees" under the RLA, (2) that *National I* and *National II* are consistent with the district court's holding, and (3) that this court should follow the Eighth Circuit's holding in

Trans World, and the Seventh Circuit's decision in *United Air Lines*.

D. Analysis

In this case, it is undisputed that replacement pilots who had begun flying regular revenue flights before Eastern's striking pilots made their unconditional offers to return to work, may be accorded permanent replacement status under the *Mackay* exception, and are not to be displaced to create positions for returning strikers. At issue is whether Eastern is obligated, under the RLA, to reinstate returning pilots prior to awarding pilot positions to new hire pilots in training who had not (1) completed Eastern's training program and IOE, (2) obtained an FAA certificate, and (3) begun flying regular revenue flights under Eastern's supervision and authority.

We note at the outset that neither the Supreme Court nor this court has specifically addressed whether the RLA requires an employer to reinstate returning strikers before awarding permanent positions to new hire trainees, such as the trainee pilots involved in this case. The answer to this question turns on whether Eastern's trainees were "permanent replacements."[4]

1. Trainees, *Trans World*, and *United Air Lines*

The narrow *Mackay* exception does not apply in this case because Eastern's trainee pilots did not attain the status of permanent replacement employees. The RLA defines an "employee" as:

> every person in the service of a carrier (subject to its continuing authority to supervise and direct

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[4] Because the Supreme Court in *Mackay* and *Fleetwood Trailer* struck the balance when it held that a legitimate and substantial business justification supports an employer's decision to displace strikers with permanent replacements in order to continue operations, we do not consider the balance anew.

> the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect . . . .

45 U.S.C. § 151, Fifth. Further, 45 U.S.C. § 181 limits "employee" status and the scope of RLA protection to "every air pilot or other person who *performs any work as an employee* or subordinate official of [a] carrier or carriers, *subject to its or their continuing authority to supervise and direct the manner of rendition of his service.*" (Emphasis added.).

In *Trans World*, the Eighth Circuit applied 45 U.S.C. § 181 and held that, under the RLA, a carrier's new hire trainees who had not completed their training prior to the end of a strike were not permanent employees, and were subject to displacement by returning strikers. *See Trans World*, 819 F.2d at 845-46. The facts of *Trans World* are indistinguishable from those in this case. In *Trans World*, the carrier hired and trained large numbers of would-be permanent replacement employees to continue operations during a flight attendant strike. At the conclusion of the strike, approximately 463 of the new hires had not completed flight attendant training.

After the strike, the carrier gave the trainees permanent replacement status and job placement preference over returning strikers. As in this case, Trans World argued that its trainees constituted permanent replacements under the RLA because the carrier had told the trainees that they were permanent employees, and paid them a salary. The Eighth Circuit rejected the carrier's argument finding that "those flight attendants holding a trainee status at the end of the strike may not be retained over striking employees." *Trans World*, 819 F.2d at 842. As the court explained:

> The trainees in question, although hired by TWA, never performed any services for TWA under its supervision prior to the Union's offer to return to work. Thus, they cannot be considered employees within the meaning of the RLA.

Trans World, 819 F.2d at 845-46. The *Trans World* court thus held that carriers cannot refuse to reinstate strikers by treating trainees as permanent replacements, and that carriers cannot reserve job positions for trainees once strikers unconditionally offer to return to work. *Trans World*, 819 F.2d at 845-47; *see also Railway Labor Executives' Ass'n v. Wheeling Acquisition Corp.*, 736 F. Supp. 1397, 1403 (E.D. Va. 1990) ("RLA rights are conferred only on 'employees' of a 'carrier' who currently perform work for that carrier.")

Similarly, in *United Air Lines*, the Seventh Circuit held that "unless a person has performed services for the employer under that employer's supervision he is not an employee for purposes of the RLA." *United Air Lines*, 802 F.2d at 913. In *United Air Lines*, the carrier recruited and began training some 500 pilots (the Group of 500) prior to the commencement of a pilot strike. United Air Lines offered 375 of these recruits, who had successfully completed their training, employment beginning on May 17, 1985, the day ALPA went on strike. All but a few of the Group of 500 honored ALPA's picket lines. In response, United Air Lines stated that it would not hire any member of the Group of 500 who had failed to report to work, except for cases involving personal hardship or other extenuating circumstances.

ALPA filed suit alleging that United Air Lines's actions with respect to the Group of 500 violated the RLA. The district court found for the Group of 500 concluding that they had become employees on May 17, 1985, the day the strike began, and that United Air Lines's treatment of these pilots after that date violated the RLA, 45 U.S.C.

§ 152, Fourth. The Seventh Circuit reversed holding that the Group of 500 were not "employees" under the RLA entitled to the protections of 45 U.S.C. § 152, Fourth. *United Air Lines*, 802 F.2d at 911 n.17. The Seventh Circuit opined:

> These pilots never performed any work for United nor did they ever submit to United's supervision of them in their work. By its own terms, the definition of employee under the RLA would exclude our giving the Group of 500 employee status.

United Air Lines, 802 F.2d at 911. The court went on to state that "trainees . . . simply do not fall within the RLA's definition of employee." *United Air Lines*, 802 F.2d at 913.

2. Eastern's Trainees

Based upon the persuasive reasoning in *Trans World* and *United Air Lines*, we hold that Eastern's new hire trainee pilots did not obtain the status of "permanent employees." First, the trainees were not qualified to perform the work Eastern's pilots ordinarily discharged. As previously stated, under FAA guidelines, Eastern's trainee pilots are required to complete a series of FAA examinations and obtain an FAA pilot certificate before operating on Eastern's regular revenue flights. To satisfy these requirements, Eastern enrolled its new-hire pilots in a training program which, in some cases, lasted as long as four months. Eastern's training program included ground school instruction, examinations, flight simulator training, and IOE.[5] Consequently, a trainee would only become qual-

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[5] We reject Eastern's contention that IOE is not part of the training/qualification process. *See, e.g., Trans World*, 819 F.2d at 841 n.2 (explaining that flight attendants are not qualified to perform revenue service until they complete IOE); Rosenbalm Aviation, 15 N.M.B. 313, 314-15 (1988) (holding that IOE is part of training mandated by the

ified to fly regular revenue flights for Eastern when the trainee successfully completes the training program, passes the FAA examinations, obtains an FAA pilot certificate and secures a release from the FAA.

Second, Eastern's trainees were not actually performing the work ordinarily discharged by the former strikers. As the district court correctly reasoned:

> Trainees, to be sure, are not qualified to perform in the stead of striking pilots. In fact, they may never be. Optimistically, they may ultimately fill the shoes of the striking employees. It would be presumptuous and premature, therefore, to afford trainees permanent replacement status which would otherwise permit Eastern to keep them in its employ notwithstanding the termination of the strike.

Eastern suggests that the distinction between trainees and returning strikers is an artificial one because the former strikers, like the trainees, must submit to training prior to again flying regular revenue flights. According to ALPA, "striking pilots can be requalified within a matter of days." Eastern maintains, however, that "having now been out of the cockpit for over 10 months, it would take a minimum of 10 days of training, to requalify a returning striker, provided that the pilot were returning to his or her prestrike category position," and assuming the pilot did not return to his or her prestrike category position, the process could take "up to 30 days." Our review of the record convinces us that the distinction between trainees and Eastern's returning pilots is real. First, the former strikers, unlike the trainees, have actually flown regular revenue flights for Eastern. Second, the returning pilots

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FAA, and that "[a]n individual may not serve as part of the cockpit crew in revenue service until he has successfully completed the training program."). As Eastern acknowledges, IOE is necessary to obtain FAA certification.

are only required to complete requalification training. Whether the duration of the requalification training is a "matter of days," ten days, or even thirty days, that period is substantially less than the time required to train and qualify the new hire pilots.

Despite the fact that Eastern's trainee pilots may never be qualified to fly regular revenue flights, Eastern argues that they are permanent employees because Eastern immediately placed the pilot trainees on its payroll, and gave them seniority numbers. We do not consider these unilateral actions to be dispositive of whether Eastern's trainees are permanent employees. As the Eighth Circuit concluded in *Trans World*:

> The RLA does not extend its coverage based upon the employer's labelling of persons as employees or the payment of salary. Rather, RLA coverage is determined by the *work the person performs* under supervision of the employer. This performance factor is determinative in trainee situations because it is the only requirement that the statute explicitly includes. Thus, clear statutory language supports the conclusion that the trainees are not employees protected by the RLA because these trainees were not "performing any work" of the carrier by any stretch of the imagination.

Trans World, 819 F.2d at 846 (emphasis in original).

Further, Eastern urges this court to disregard the Eighth Circuit's decision in *Trans World* and the Seventh Circuit's holding in *United Air Lines* because, according to Eastern, a new hire recruit need not attain "employee" status under the RLA to be deemed a permanent replacement. We reject Eastern's urgings. Acceptance of Eastern's analysis would result in the creation of two classes of common carrier employees; "permanent employees" entitled to the benefits and privileges of the RLA and bound

by its duties and penalties, and a second class of "permanent employees" (the trainees) whose employer/employee relationship is not governed by the regulatory framework established by the RLA, and who are not extended the same benefits and obligations available to the other class of "permanent employees." No authority leads us to create such an anomalous situation.

3. *National I* and *National II*

Eastern argues that *National II* is controlling and requires that we hold that its trainees are permanent replacements. In *National I*, the Fifth Circuit held that the carrier had exceeded the permissible bounds of self-help by discharging employees who had engaged in an unlawful wildcat strike; the carrier "was entitled only to hire replacements for the strikers in order to operate its airline." 416 F.2d at 1007. In reversing the district court, the Fifth Circuit held that, under the RLA, the carrier could only refuse to reinstate former strikers if the strikers' jobs had been "filled" by permanent replacements "either at the time of the discharge or before the time the strike would have run its course." *National I*, 416 F.2d at 1007. The Fifth Circuit remanded the case to the district court to determine the number of positions "filled" by replacements. On remand, the district court held that the carrier had "hired" sixty-seven replacements as of the date that the strikers would have returned to work. *National Airlines, Inc. v. International Ass'n of Machinists*, 308 F. Supp. 179, 182 (S.D. Fla.), *rev'd*, 430 F.2d 957 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971).

The Fifth Circuit again reversed the district court, and remanded the case for a determination of the number of striking employees who had been "replaced" by new hire employees as of the date the strike would have ended. "In cases of replacement of a striker," the court concluded:

> the critical time is when the arrangements with the replacement worker become fixed and irrev-

> ocable. Thus, if an employer has the intention to bind itself to a firm contract of employment, and the employee has accepted a specific job assignment, the replacement is "hired" even though subsequently he may be divested of the job for failure to pass medical or security clearance.

430 F.2d at 961 (citations omitted).

Although *National I* and *National II* are instructive, we do not agree with Eastern that these cases compel a reversal of the district court. First, in *National II*, the Fifth Circuit carefully noted that the critical time for determining when an employee is replaced is when the arrangements with the worker become "fixed and irrevocable." 430 F.2d at 961. In this case, although the new hires were on the payroll, as trainees their employment status could hardly be classified as "fixed and irrevocable" given that they could only fly regular revenue flights for Eastern *if* they successfully completed the training program and satisfied FAA requirements.

Second, *National II* did not, as does the present case, involve the employment status of trainees who could only work for the employer when they satisfactorily completed a lengthy training program and secured the requisite governmental releases and certificates. Nothing in *National II* permits carriers to refuse to reinstate former strikers by reserving available job positions for a significant period of time while a pool of unqualified trainees completes this process.

Third, we read the Fifth Circuit's dictum that a "replacement is 'hired' even though subsequently he may be divested of the job for failure to pass medical or security clearance" to mean that an employer can treat a new hire as a permanent replacement where, but for the failure to subsequently satisfy a technical qualification, the new hire would otherwise be considered a permanent employee. The prerequisites at issue in this case (i.e. satisfactory com-

pletion of Eastern's training program and compliance with the FAA's requirements) do not amount to technicalities which would allow Eastern, under *National II*'s reasoning, to treat a trainee as a permanent replacement prior to the trainee satisfying these job requirements. Consequently, we hold that the *Mackay* exception does not apply in this case because Eastern's trainees were not permanent replacements.

4. RLA Policy

Our conclusion, that Eastern is required to reinstate returning pilots prior to awarding pilot positions to new hire pilots, is consistent with RLA policy. Eastern's decision to refuse to reinstate returning pilots while reserving available pilot positions for unqualified trainee pilots, did not promote one of the declared purposes of the RLA which is to "avoid any interruption to commerce or to the operation of any carrier." 45 U.S.C. § 151a. As the district court reasoned:

> Hiring trained, qualified pilots is congruous with the undisputed purpose of the RLA: providing for uninterrupted transportation service, thereby maintaining the status quo. Enlisting a fleet of unqualified trainees for potential future hiring needs, however, satisfies a concern significantly more remote. To be sure, trainees cannot fly revenue raising flights until they have completed the training program. Their utility to the airline is contingent upon becoming qualified for the position. Thus, contracting with unqualified persons for future employment as pilots did not serve to fill the void left by the striking pilots, at least not until some later date.

Further, we agree with the Eighth Circuit's observation in *Trans World* that:

> to amass a trainee pool capable of replacing the entire striking workforce at some future date

> after the strike has ended . . . is inconsistent with the RLA's grant of protections to those persons who actually perform services for the employer.

819 F.2d at 846.

Moreover, Eastern's treatment of the returning pilots strikes a fundamental blow to the union and the collective bargaining process. *See Trans World*, 103 L. Ed. 2d at 471 ("we should hesitate to imply limitations on all but those forms of self-help that strike a fundamental blow to union or employer activity and the collective bargaining process itself."). Not only does Eastern's decision to give preference to trainees over returning strikers discourage employees from exercising their rights to organize and to strike, it undermines one of the RLA's central goals: the preservation of the employer-employee relationship both during and after a strike. *See Fleetwood Trailer*, 389 U.S. at 378; *Empresa Ecuatoriana de Aviacion, S.A. v. District Lodge No. 100*, 690 F.2d 838, 845 (11th Cir. 1982), *cert. dismissed*, 463 U.S. 1250 (1983).

5. Preliminary Injunction

Finally, we find that the district court's preliminary injunction is not impermissibly vague. Rule 65(d) of the Federal Rules of Civil Procedure simply requires "that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is prescribed." *See* C. Wright and A. Miller, 11 Federal Practice and Procedure § 2955 at 536-37 (1973 & Supp. 1990); *see also Williams v. City of Dothan, Ala.*, 818 F.2d 755, 761 (11th Cir. 1987) ("As this court has noted, Rule 65(d) should not be applied strictly; rather the inquiry should be whether the parties subject to the injunctive order understood their obligations under the order."). Here, the district court's order clearly requires Eastern to reinstate the number of former strikers necessary to fill those pilot positions unlawfully reserved for trainees at the end of the strike. Because the district court has yet to deter-

mine the specific number of Eastern pilot positions covered by the preliminary injunction and other issues, we remand the case to the district court.

CONCLUSION

For the foregoing reasons, we hold that the district court properly concluded that the RLA requires Eastern to reinstate returning strikers prior to awarding pilot positions to new hire pilots in training. We remand this case to the district court for further proceedings.

AFFIRMED and REMANDED FOR FURTHER PROCEEDINGS.

ANDERSON, Circuit Judge, dissenting:

Respectfully, I dissent. In my judgment, binding precedent in this circuit requires reversal. In a very similar context, the Former Fifth Circuit held that a newly-hired permanent employee is not displaced by a returning striker "even though subsequently he may be divested of the job for failure to pass medical or security clearance." *National Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers*, 430 F.2d 957, 961 (5th Cir. 1970). I do not agree with the majority that the conditions of employment in *National Airlines*—i.e., medical or security clearance—can be dismissed as merely technical. In the airline industry, the medical condition and security clearance of workers is not technical.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-1630-CIV-DAVIS

EASTERN AIR LINES, INC.,

Plaintiff,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and EASTERN MASTER EXECUTIVE COUNCIL,

Defendants.

FILED
U.S. Dist. Ct.
S. D. Of Fla. Miami
August 2, 1990
ROBERT M. MARCH

O R D E R

THIS MATTER is before the court on the following Motions:

(1) AIR LINE PILOTS ASSOCIATION, INTERNATIONAL's ("ALPA") Motion for Preliminary Injunctive Relief under Count I of ALPA's Counterclaims;

(2) ALPA's Motion for Summary Judgment; and

(3) EASTERN AIR LINES, INC.'s Motion for Summary Judgment.

I. BACKGROUND

The facts material to the issue presently before the court are largely undisputed. On March 4, 1989, after fully exhausting the dispute resolution mechanisms of the Railway

Labor Act[1] ("RLA") the International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM") commenced a strike against Eastern Air Lines, Inc. ("EASTERN"). On that same day, the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL ("ALPA"), by vote of its Master Executive Council, honored the IAM's picket lines. In an action before this court, ALPA's strike was held to be a lawful sympathy strike. *Eastern Air Lines, Inc. v. Air Line Pilots Ass'n, Intern.*, 710 F. Supp. 1342 (S.D. Fla.), *aff'd*, No. 89-5229 (11th Cir. June 7, 1989).

During the ALPA strike, EASTERN hired new pilot recruits to fill pilot positions left vacant because of the strike. Under Federal Aviation Administration ("FAA") guidelines, trainee pilots must complete a series of FAA examinations, obtain an FAA pilot certificate, and secure a release from the FAA before operating EASTERN aircraft on regular revenue flights. Each new hire pilot, irrespective of level of experience, is required under these guidelines to complete training successfully before flying regular revenue flights. Under EASTERN's own regulations, pilot trainees and current pilot employees must undergo periodic training to familiarize themselves with specific EASTERN procedures and aircraft type. In order to meet the above requirements, EASTERN's new hire pilots were placed in a six to eight-week EASTERN training program. The program generally includes ground school instruction, flight simulator training, and the completion of training flights under the direction of EASTERN and/or FAA flight instructors.

By the middle of August 1989, several striking ALPA pilots had made individual unconditional offers to return to work for EASTERN. On or about August 11, 1989, EASTERN announced that EASTERN pilot positions were no longer available to former strikers and that former

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[1] 45 U.S.C. §§ 151-188 (1982).

strikers wishing to return to work would be placed on inactive status on a preferential recall list for future pilot positions that might become available. At this point, approximately 800 new hire replacement pilots were still in training. On November 22, 1989, ALPA informed EASTERN of its unconditional termination of the pilot strike and that all former strikers were immediately and unconditionally available to return to work. By this date, approximately 250 new hire replacement pilots remained in training. From at least early August to the present date, EASTERN has filled vacant pilot positions from the ranks of its new hire pilots rather than from the ALPA pilots who had unconditionally offered to return to service.

On August 11, 1989, EASTERN filed this declaratory judgment action. ALPA has counterclaimed for injunctive and declaratory relief. It is undisputed in this lawsuit that replacement pilots who had actually begun flying regular revenue flights before ALPA pilots made their unconditional offers to return to work may be accorded permanent replacement status, and need not be displaced to create positions for returning strikers. Thus, both parties agree that the only issue to be determined at this juncture is the reinstatement rights of the returning strikers vis-a-vis those new hire pilots who were still in training, and who had not yet begun flying regular revenue flights ("trainees") when the ALPA pilots made unconditional offers to return to work.

II. DISCUSSION

ALPA now moves for summary judgment as to EASTERN's claims and for a Preliminary Injunction under Count I of its Counterclaim. EASTERN has filed a Cross Motion for Summary Judgment on its Complaint for Declaratory Relief.

A. SUMMARY JUDGMENT STANDARD

A party seeking summary judgment bears the burden of demonstrating that there exists no genuine dispute as

to any material fact. Fed. R. Civ. P. 56(c) and (e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). All reasonable doubts as to the facts are to be resolved in favor of the party opposing summary judgment. *Mercantile Bank & Trust v. Fidelity Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985). While the burden on a party seeking summary judgment is great, the opposing party has a duty to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Anderson*, 477 U.S. at 250. As stated at the outset, the facts in the instant dispute are largely undisputed, and both parties have filed Motions for Summary Judgment.

B. THE RAILWAY LABOR ACT

Within the jurisprudence of reinstatement rights under the National Labor Relations Act ("NLRA"), an employer's refusal to reinstate former strikers constitutes an unfair labor practice, unless the employer can show that his action is supported by a legitimate and substantial business justification. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). As first illustrated by the Supreme Court in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), one such justification arises when, in an economic strike, returning strikers' jobs have been filled by workers hired as permanent replacements during the strike in order for the employer to continue operations. *Fleetwood Trailer*, 389 U.S. at 379. In such cases, it is routinely held that an employer is not bound to discharge the permanent replacements in order to make room for returning strikers. *See, e.g., Belknap, Inc. v. Hale*, 463 U.S. 491, 500 (1983); *Fleetwood Trailer*, 389 U.S. at 378; *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 232 (1963); *Mackay*, 304 U.S. at 345-47. In short, the employer's interest in continuing operations is "deemed to outweigh the damage to concerted activities caused by permanently replacing strikers." *Erie Resistor*, 373 U.S. at 232. While the burden of proving that the replacements were hired as permanent employees

falls squarely on the shoulders of the employer, *Fleetwood Trailer*, 389 U.S. at 378, the law allows for a considerable degree of contingency in the replacements' employment contract. *See Belknap*, 463 U.S. at 502-04.

Moreover, the issue of reinstatement rights has focused on the rights of the returning strikers, not on the rights or degree of protection afforded to the replacement workers.[2] Under *Belknap*, the rights of the replacement employees are enforceable even if antithetical to the rights of the returning strikers. A corollary follows: the rights of the replacement employees do not determine whether the employer has an obligation to reinstate past strikers.[3]

Although the principles discussed above arose under the National Labor Relations Act, courts have uniformly held that the general rule of *Mackay* applies with equal force in cases arising under the Railway Labor Act[4] ("RLA"). *See Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989); *National Airlines, Inc. v. International Ass'n of Machinists & Aerospace Workers*, 416 F.2d 998 (5th Cir. 1969), *appeal after remand*, 430 F.2d 957 (5th Cir. 1970). In *Trans World Airlines, supra*, the Supreme Court recently approved the borrowing of precedent developed under the NLRA in order to aid the analysis of reinstatement rights under the RLA. The Court borrowed extensively from common law developed under the NLRA, but cautioned that because of the differing

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[2] As will be more fully developed in Part II.C., post, the inquiry as to whether the replacements are permanent is relevant not to determine the replacements' entitlement, but to determine the existence of a legitimate and substantial business justification.

[3] Again, the status of the replacements *is* relevant for the purpose of determining whether an employers' decision not to reinstate returning strikers is justified. *See supra* note 2. Here, as ALPA admits, EASTERN might be liable in contract to the replacements, irrespective of whether they are covered by the RLA.

[4] 45 U.S.C. §§ 151-188 (1982).

policies inherent in the two Acts, NLRA principles "cannot be imported wholesale into the railway labor arena." *Id.* at 1233 (quoting *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969)).

In the context of the RLA, the former Fifth Circuit,[5] after recognizing the common carrier's duty to make all reasonable efforts to continue its operations during a strike, held the hiring of permanent replacements to be consistent with the attempt to restore service. *National Airlines, Inc. v. International Ass'n for Machinists and Aerospace Workers*, 416 F.2d 998, 1006 (5th Cir. 1969) ("*National I*"). In its opinion after remand, the Fifth Circuit provided guidance in identifying replacement workers, noting as critical the time when arrangements with the replacement workers become fixed and irrevocable:

> Thus, if an employer has the intention to bind itself to a firm contract of employment, and the employee has accepted a specific job assignment, the replacement is 'hired' even though subsequently he may be divested of the job for failure to pass medical or security clearance.

National Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers, 430 F.2d 957, 961 (5th Cir. 1970) ("*National II*"), *cert. denied*, 400 U.S. 992 (1971). The court went on to stress, however, that a mere offer and acceptance is not always enough. The court also found important "the necessity of actually coming on the payroll" and the commencement of actual employment. In remanding the issue to the district court for further factual determinations as to whether the strikers had been replaced, the court concluded that "[i]n the present case, the formation of an employment contract with a replacement,

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[5] The Eleventh Circuit adopted as binding all decisions of the former Fifth Circuit handed down by October 1, 1981. *Bonner* v. *City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981).

which never ripens into actual employment, may not displace the statutory right of the discharged employee to return to the status quo." *Id.* Thus, *National II* teaches that something more than an employment contract between the employer and replacement employee must exist before the striking employee's status is supplanted. Whether participating in a training program constitutes that "something more" is the question now before this court.

C. STRIKERS OR TRAINEES?

No authority binding on this court has directly addressed the issue of whether replacements still in training at the time a strike is called off may be accorded permanent replacement status. The United States Court of Appeals for the Eighth Circuit, however, has answered that question in the negative. *Independent Fed'n of Flight Attendants v. Trans World Airlines*, 819 F.2d 839 (8th Cir. 1987), *rev'd on other grounds*, 489 U.S. 426 (1989) ("*Flight Attendants*").[6] In *Flight Attendants*, the Eighth Circuit held that replacement personnel (flight attendants) who had not completed training prior to the end of an IFFA strike could not be accorded permanent replacement status under the RLA.[7] *Id.* In arriving at this conclusion, the court observed that "RLA coverage is determined by the work the person performs under supervision of the employer." *Id.* at 846; *accord Air Line Pilots Ass'n v. United Airlines*, 802 F.2d 886, 913 (7th Cir. 1986) ("unless a person has

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[6] The Supreme Court granted certiorari on an issue regarding the status of cross-over employees, but did not address the issue of replacement trainees. *Trans World Airlines v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989).

[7] The RLA provides coverage to "every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service." 45 U.S.C. § 181.

performed services for the employer under that employer's supervision he is not an employee for purposes of the RLA"), *cert. denied*, 480 U.S. 946 (1987).

To the extent that the pilot trainees in the instant case had not performed the work ordinarily discharged by the striking pilots, the trainees were not employees protected by the RLA. Trainees, to be sure, are not qualified to perform in the stead of the striking pilots. In fact, they may never be. Optimistically, they *may* ultimately fill the shoes of the striking employees. It would be presumptuous and premature, therefore, to afford trainees permanent replacement status which would otherwise permit EASTERN to keep them in its employ notwithstanding the termination of the strike. As the Eighth Circuit has remarked:

> [T]o amass a trainee pool capable of replacing the entire striking workforce at some future date after the strike has ended . . . is inconsistent with the RLA's grant of protections to those persons who actually perform services for the employer.

Flight Attendants, 819 F.2d at 846.

That EASTERN trainees do not enjoy permanent replacement status under RLA is consistent with the balancing analysis germane to NLRA disputes. *See Mackay*, 304 U.S. 333 (1938). The inquiry that has continuously controlled the issue of reinstatement rights under the *Mackay* rule is whether the failure to reinstate returning strikers is necessary for the continued operation of the business. If so, the action is deemed to be a legitimate and substantial business justification. *Fleetwood Trailer*, 389 U.S. at 378. The need to continue employer's operations is particularly salient here, in light of the RLA's concern for the continued operation of this country's vital network of transportation industries.

While this court agrees that EASTERN had a legitimate and substantial business justification to replace striking

pilots with replacement pilots who could promptly assume the requisite duties and responsibilities of striking pilots, the same does not hold true with regard to trainees. Hiring trained, qualified pilots is congruous with the undisputed purpose of the RLA: providing for uninterrupted transportation service, thereby maintaining the status quo. Enlisting a fleet of unqualified trainees for potential future hiring needs, however, satisfies a concern significantly more remote. To be sure, trainees cannot fly revenue raising flights until they have completed the training program. Their utility to the airline is contingent upon becoming qualified for the position.[8] Thus, contracting with unqualified persons for future employment as pilots did not serve to fill the void left by the striking pilots, at least not until some later date.

And, the inquiry now is whether Eastern has a legitimate *and substantial* business justification for preferring unprepared trainees over striking pilots who have returned to work. In this vein, the Supreme Court has held that:

> In *some situations*, "legitimate and substantial business justifications" for refusing to reinstate striking employees who engaged in an economic strike, have been recognized. One is when the jobs claimed by the strikers are *occupied* by workers hired as permanent replacements during the strike in order to continue operations.

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[8] Although the former Fifth Circuit stated in *National II*, 430 F.2d at 961, that included among those "hired" as permanent replacements, are persons "subsequently . . . divested of the job for failure to pass medical or security clearance," *ante* at 7, this court does not read that passage to mean that a trainee, unqualified for the position he is seeking, must be accorded permanent replacement status. Even if the court would accord such status to an otherwise qualified person when not able to meet medical or security clearance, that does not compel the same conclusion for a person inherently incapable of performing the job in question because of lack of skill and training.

Fleetwood Trailer, 389 U.S. at 379 (emphasis added). Thus, EASTERN has no legitimate business justification in choosing to employ trainees who have not yet occupied pilot positions, over unconditionally available, striking pilots, even if it has enforceable contractual obligations to the trainees. *Id.*; *cf. Belknap*, 463 U.S. at 512 (employer may be liable in contract to ousted replacement pilots, even though forced to reinstate strikers in an unfair labor practices dispute).

III. CONCLUSION

That the striking pilots are entitled to displace trainees does not necessarily imply that Eastern acted unreasonably in cultivating a sizable training pool of potential pilots to assuage a future crisis. But this court must balance competing interests: the rights of striking pilots to return to their jobs against management's efforts to maintain the status quo throughout the strike. After careful consideration, this court concludes that the *Mackay* balance weighs in favor of reinstating the striking pilots in place of the trainees. Accordingly, it is hereby

ORDERED AND ADJUDGED as follows:

[1] that ALPA's Motion for Preliminary Injunctive Relief under Count I of ALPA's Counterclaims be GRANTED;

[2] that ALPA's Motion for Summary Judgment be GRANTED;

[3] that EASTERN AIR LINES, INC.'s Motion for Summary Judgment be DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of July, 1990.

/s/ Edward B. Davis
EDWARD B. DAVIS
UNITED STATES DISTRICT JUDGE

cc: Counsel of record
rap/hms 073190

APPENDIX C

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 90-5658

EASTERN AIR LINES, INC.,

Plaintiff-Counterclaim
Defendant-Appellant,

versus

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, EASTERN AIR LINES MASTER EXECUTIVE COUNCIL,

Defendants-Counterclaim
Plaintiffs-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCIUT
MARCH 15, 1991
MIGUEL J. CORTEZ
CLERK

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion December 20, 1990, 11th Cir., 19___, ___ F.2d ___).

Before: HATCHETT and ANDERSON, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5658

D.C. Docket No. 89-1630-Civ-EBD

EASTERN AIR LINES, INC.,

Plaintiff-Counterclaim
Defendant-Appellant,

versus

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, EASTERN AIR LINES MASTER EXECUTIVE COUNCIL,

Defendants-Counterclaim
Plaintiffs-Appellees.

Appeal from the United States District Court or the Southern District of Florida

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Before HATCHETT and ANDERSON, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ANDERSON, Circuit Judge, dissented and filed an opinion.

* Honorable Jessee E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED; and that this cause be and the same is hereby REMANDED to said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that plaintiff-counterclaim defendant-appellant pay defendants-counterclaim plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 20, 1991
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: March 26, 1991

APPENDIX E

(ATTACHMENTS OMITTED)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 89-1630-CIV-DAVIS

EASTERN AIR LINES, INC.,

Plaintiff,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and EASTERN AIR LINES MASTER EXECUTIVE COUNCIL

Defendants.

DECLARATION OF ALAN C. GIBSON

I, Alan C. Gibson, do hereby swear and affirm as follows:

1. I am Staff Vice President, Labor Relations at Eastern Air Lines, Inc. ("Eastern"), a position I assumed on August 11, 1987. In this position, I have day-to-day responsibility for the development, implementation and administration of all labor relations policies and collective bargaining agreements of Eastern, including those governing the employment of Eastern pilots represented by the Air Line Pilots Association, International ("ALPA"). With the exception of a five month period in 1966, I have been continuously employed by Eastern since 1964 in various positions concerning either the administration of labor relations policies governing the employment of Eastern pilots represented by ALPA, pilot crew scheduling or pilot

bidding and utilization. I offer this Declaration to provide factual information supporting Eastern's position that its new hire pilots in training are properly treated by Eastern as permanent replacements for the formerly striking pilots and, like all other Eastern pilots, properly hold a seniority date as of their first day of training at Eastern. I also offer this Declaration to clarify certain misrepresentations reflected in the Declaration of J. Randolph Babbitt ("Babbitt Dec.") submitted by ALPA in support of its motion for summary judgment and for preliminary injunctive relief.

I. BACKGROUND

2. ***ALPA's Offer To Return To Work***. At 5:30 p.m. EST on Wednesday, November 22, 1989, I received a telephone call from Charles Copeland, Master Executive Chairman for ALPA at Eastern. Mr. Copeland read aloud to me a letter which he stated was then being faxed to me. The letter stated that ALPA was terminating its strike against Eastern which had begun on March 4, 1989 and was making an unconditional offer to return to work on behalf of pilots still on strike.[1]

3. ***Pilot Employment As Of ALPA's Offer.*** Of the approximately 3500 active pilots at Eastern as of March 3, 1989, 214 never honored ALPA's strike, and 754 had participated in the strike for some time but had individually offered to return to work prior to ALPA's offer on November 22 ("crossover pilots"). Of the crossover pilots, 844 had been recalled to active service, with their full seniority, prior to ALPA's November 22 offer to return; 30 had been recalled but had not yet begun retraining as of that date; and 94 had not been recalled but remained on the preferential recall list as of that date. In addition

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[1] Mr. Copeland subsequently advised Eastern that individual striking pilots might want to continue to honor the picket line of the IAM, which continues on strike to this date.

to the 968 crossover pilots, during the ALPA strike Eastern hired 1223 new hire pilots, of whom 936 remain in Eastern's employment today. Of the new hires still at Eastern, 709 had completed their training and were in line service as pilots as of 5:30 p.m. on November 22, 1989; 227 new hires remained in training. Of those 227 new hire pilots in training on November 22, 19 remained in training as of January 12, 1990. Of the remaining, 183 completed training and are now at work in revenue service; 25 have left Eastern's employ.

4. ***Eastern Delayed New Hire Training To Accommodate Returning Strikers***. Following ALPA's strike on March 4, 1989, only 6% of Eastern's pilots elected to report for work, and Eastern was therefore forced to cancel all but a small portion of its schedule.[2] On March 6, 1989 Eastern's President, Phil Bakes, publicly pleaded with Eastern's pilots to return to work in order "to save Eastern and to save your jobs," and the jobs of thousands of other Eastern employees who were promptly furloughed due to the strike.[3] On March 6-8, 1989, Eastern unsuccessfully sought an injunction to compel ALPA to terminate pilot participation in the strike. Subsequently, on

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[2] From March 4 through June 8, Eastern was able to operate only its Eastern Shuttle, its South American routes, and a few other domestic routes, in total approximately 10% of its pre-strike schedule.

[3] On March 6, 1989 Eastern promulgated Return-To-Work procedures to govern the reinstatement of striking pilots to available positions. Attachment A. The Procedures clearly indicated that strikers were welcome to return to available positions, but that a returning striker could not displace a working pilot. The Procedures provided that strikers would be reinstated in the order in which they made offers to return to work, subject to qualifications. These Procedures have been consistently utilized to date. Since the start of the strike 874 returning strikers have been reinstated to active service in accord with these Procedures. Eastern has not considered positions to be available where it has made a commitment to a new hire pilot to fill the position, whether or not that new hire pilot has completed the training necessary for the position.

March 9, 1989, the economic consequences of the strike by its pilots forced Eastern to file for reorganization under Chapter 11 of the Bankruptcy Code.[4] Eastern quickly concluded that a successful reorganization would depend on the speed with which it would be able to return to the marketplace and attempt to recapture market share. That speed, however, was restricted by the number of pilots immediately available, complexities of pilot training and staffing, and the limitations of Eastern's pilot training facilities.[5] Accordingly, Eastern announced its intention to gradually rebuild its flight schedule and on March 21, 1989 began recruiting and advertising for new pilots to staff its operations as permanent replacements for the striking pilots. I was placed in charge of the initial phases of the new pilot hiring program.

5. Although in the early months of the ALPA strike there were few crossovers,[6] by June 1989, after it became

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[4] ALPA was fully aware that its actions might force Eastern into bankruptcy. In an ALPA videotape distributed to Eastern pilots three weeks prior to the strike, ALPA's financial advisor, Farrell Kupersmith, acknowledged that Eastern might go into bankruptcy if the pilots went on strike. Attachment B at 13. In a videotape distributed to employees three days prior to the strike, Eastern Chairman Frank Lorenzo stated that "Eastern does not have the financial resources to be able to withstand a strike." Attachment C at 2. On March 7, 1989, at a federal court hearing on Eastern's motion for a temporary restraining order preventing ALPA from striking, ALPA's counsel further confirmed that ALPA was aware of the consequences of its actions, asking rhetorically "Don't you think the Eastern pilots are aware that what they are doing might result in a Chapter 11 proceeding?" Attachment D at 100.

[5] Pilot training requires the extensive use of very sophisticated cockpit and flight simulators, and the availability of simulator time is a dominant factor in determining a carrier's maximum pilot training capability. Eastern maintains 9 simulators and can, if operating at its maximum capability, train approximately 130 pilots per month. Eastern's pilot training department has operated at its maximum capability since March 27, 1989 and continues to do so today. In an effort to increase its training capability during the strike Eastern unsuccessfully attempted to contract for simulator time with other carriers, a common industry practice.

[6] Between March 27 and July 30, 168 formerly striking pilots became

apparent that Eastern was continuing to operate, was successfully finding a more than adequate supply of qualified new hire applicants, and was proceeding to reorganize, the number of crossovers began to increase. By late July and early August 1989, ALPA's leadership and general membership were publicly debating the possibility of an offer to return to work. While the leadership and a majority of those who voted in a general membership vote ultimately rejected that option at that time, 307 striking pilots, apparently spurred by the debate, made offers to return to work between August 1 and August 11, 1989. In light of the sudden availability of so many crossovers, Eastern announced on that date that it was terminating its pilot hiring program and that it would not commence any additional new hire training classes (although a large number of qualified candidates had already been interviewed for such classes). An additional 279 striking pilots made individual offers to return to work after August 11 and prior to ALPA's offer on November 22. As of November 22 (and continuing as of the date of this Declaration), 874 crossover pilots had been recalled to work in accordance with Eastern's Recall-To-Work Procedures: 94 crossover pilots remain on the preferential recall list in the order in which they made their offers to return.

6. As a result of the availability of the additional 307 crossover pilots, Eastern "stretched out" the training of those new hire pilots already in class to make possible the more rapid recall and requalification training of the returning strikers, thus permitting a more rapid expansion of its flight schedule in the Fall months. If Eastern had not adjusted its pilot training schedule to accommodate and facilitate the return of the striking pilots, substantially all of the 227 new hire pilots at issue would have concluded

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crossovers. In accordance with Eastern's Return-To-Work Procedures, all were promptly recalled with full seniority, went through requalification training and returned to work.

their training prior to ALPA's offer to return on November 22, 1989. Thus, contrary to Mr. Babbitt's suggestion of hostile discrimination by Eastern against returning strikers, *see* Babbitt Dec. at ¶ 7, Eastern's voluntary decision to advance the requalification training of the crossovers actually made it possible for them to return to work faster than was otherwise required.

II. THE NATURE OF PILOT TRAINING AT EASTERN.

7. Every pilot hired by Eastern during the strike was already licensed by the Federal Aviation Administration as an airline transport pilot or commercial pilot with multiengine rating and instrument rating. In addition, each applicant had to possess the following minimum qualifications in order to receive further consideration for employment at Eastern: (i) 1,200 hours of fixed wing flight time, and (ii) 200 hours of pilot in command of multiengine aircraft (or military equivalent) flight time.[7] Thus, every pilot applicant offered employment by Eastern is already an FAA licensed and qualified pilot. Despite such qualifications, every pilot hired at Eastern has always been required to complete further training under Eastern's FAA-required and approved Pilot Training Program. This program provides Eastern-specific training to each new hire pilot, training them in Eastern's flight operations and flight crew management procedures and Eastern's specific cockpit equipment configurations for the type of aircraft to which they were assigned.[8] The FAA-approved training program

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[7] Since the commencement of ALPA's strike against Eastern on March 4, 1989, most of Eastern's new hire pilots have substantially exceeded these qualifications, frequently including years of experience as pilot in command for charter, supplemental and commuter carriers. Pilots hired since the beginning of ALPA's strike have possessed an average of approximately 5,700 hours of pilot flight time experience.

[8] While the aircraft and operating procedures of most major carriers are similar, each carrier has unique features in its equipment and procedure.

includes an Eastern-specific syllabus for pilot training for each pilot position (Captain, First Officer, Second Officer) on each type of aircraft in Eastern's fleet. New hire pilots are trained in basic Eastern operating procedures and then in the specific position and equipment to which they will be assigned. During training each pilot is subject to the supervision and control of Eastern Flight Operations management personnel.[9] Neither the basic structure nor the requirements of its Pilot Training Program were changed during the ALPA strike (due to facility constraints, however, pilot training was requiring at least eight weeks to complete, longer than prior to the strike).[10]

8. The Eastern-specific training which a new hire Eastern pilot receives would be of limited use to that pilot if he resigned from Eastern to join another major carrier with similar aircraft equipment, because the pilot would have to complete that carrier's training program.[11] Again, the training at issue here is not training to learn how to be a pilot; all of Eastern's new hire pilots are fully qualified and licensed FAA pilots with thousands of hours of flight experience. The training they are required to com-

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[9] Following his or her acceptance of an offer of employment as a pilot with Eastern, each new hire pilot is assigned by Eastern to report to a scheduled initial pilot training program. At the outset of the program, all pilots in training are advised of Eastern's rules and regulations regarding their conduct as Eastern employees generally and their attendance and performance in the training program. All such pilots in training have their entire training schedules set by Eastern, including the starting and ending time of classes, duration of breaks and location of accommodation during training.

[10] As stated, as a result of the August influx of a large number of crossover pilots, the training for new hire pilots was stretched out to accommodate the training of returning strikers, and in some cases has taken up to 4 months.

[11] Illustrative of this point is Eastern's experience in its 1973 merger with Caribair. Caribair pilots who were qualified as DC-9 Captains were nonetheless required to undergo full re-training as DC-9 Captains under the Eastern training syllabus.

plete is to familiarize them with Eastern procedures and equipment and is no different from the training required by veteran Eastern pilots when they change position or aircraft type. In fact, Eastern has an "up or out" policy, whereby veteran Eastern pilots must, to continue their employment at Eastern, eventually successfully complete the same training for a Captain position as required by Eastern's new hire pilots who have been trained for such positions.

9. Pursuant to FAA regulations, *see* 14 C.F.R. § 121.433 ("Training Required"), Eastern's Pilot Training Program includes ground school (technical classroom training complete with written examinations) and extensive use of sophisticated cockpit and flight simulators. Pursuant to a separate FAA regulation, *see* 14 C.F.R. § 121.435 ("Operating Experience"), following the completion of the Eastern Pilot Training Program, each pilot is required to fulfill anywhere from 10-25 hours of operating experience on the aircraft for which he has been trained. Such experience, referred to as Initial Operating Experience ("IOE"), is obtained by the new hire pilot or veteran Eastern pilot on assuming a crew member position on a revenue flight, under the supervision of a "check pilot," who observes the new hire's performance. A pilot's IOE does not take place until the pilot has completed all appropriate ground and flight training as prescribed by 14 C.F.R. § 121.433, and have been assigned as a regular pilot to a pilot domicile. Indeed, the only reference to a pilot's "initial on-line qualification" in the Eastern-ALPA agreement is found in Section 27(T) ("Assignment Of Flying At A Domicile") (Attachment E), not in Section 26 ("Training").[12]

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[12] Mr. Babbitt's statement that pilot training at Eastern includes IOE is a gross mischaracterization. Babbitt Dec. at ¶ 5. Initial operating experience is only necessary to obtain FAA certification, and is clearly *not* part of his Eastern provided training and is not included on any pilot training syllabus. Thus, at Eastern, a new hire pilot's IOE occurs

III. PILOTS IN TRAINING AT EASTERN HAVE ALWAYS BEEN RECOGNIZED IN ALL RESPECTS AS EMPLOYEES IN THE SERVICE OF EASTERN

10. Mr. Babbitt's Declaration acknowledges that new hire pilots in initial training have always been awarded pilot seniority numbers and accrued seniority from their first day of training. Babbitt Dec. ¶ 9. Incredibly, Mr. Babbitt nonetheless erroneously asserts that such pilots are not treated as Eastern employees under the Eastern-ALPA contract or past practice. This assertion is belied not only by the award of a seniority number but also by the fact that new hire pilots have always been treated as in the "service" of Eastern and have received pay, and accrued seniority, vacation, sick leave and service credit for pension purposes under the Eastern-ALPA contract from their first day of training, which is considered to be their "date of hire."[13]

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after the pilot completes training and reports to his or her assigned domicile and is accomplished while the pilot is flying in revenue service.

[13] Mr. Babbitt's assertions are also belied by positions taken by ALPA in grievance proceedings conducted pursuant to the Eastern-ALPA agreement. For example, in the grievances of Robert S. Braunstein and Kenneth Nease, which were heard together on June 25, 1987, ALPA's representative, Mr. John Loomos, took the position that the Eastern-ALPA agreement governed new hire pilots while in training. "Section 26 of the Agreement . . . protects the pilot from having to pay for any training that he receives while he is in the employ of Eastern; that would be training which is necessary for him to obtain or maintain his qualifications to function as an Eastern pilot." Attachment G at 7-8. During that same hearing, Mr. Loomos stated that "[a pilot's] name goes on the seniority roster at the date you are hired. We all know the rates of pay and working conditions of these pilots or any pilot hired by Eastern is governed by the Agreement (between Eastern and ALPA)." *Id.* at 26. Likewise, in a grievance filed on June 7, 1989, ALPA represented one of the pilot's hired as a permanent replacement during the strike who had been terminated by Eastern prior to the completion of his initial training. Attachment H. Thus, Mr. Babbitt's assertions that new hire pilots in training are not represented by ALPA and are not covered by the Eastern-ALPA agreement are contradictory to positions previously adopted by ALPA.

11. ***New Hire Pilots In Training At Eastern Have Always Been Placed On The Payroll On Their First Day In Training.*** Section 3-B of the Eastern-ALPA Agreement, "Longevity Pay Rates" (attached hereto as Attachment F, as amended February 23, 1986) provides as follows:

> Pilots in their first year of accredited service with Eastern as a pilot shall be paid only a monthly salary calculated in accordance with the following table:
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> | | |
> |---|---|
> | 1st six months | $1,450.00 |
> | 2nd six months | $1,600.00[14] |

During my entire 25 years of service at Eastern, new hire pilots arriving at Eastern have been placed on the payroll pursuant to this provision, or its predecessors, on their first day of training at Eastern,[15] which is usually six to eight weeks prior to their first flight as a pilot in revenue service for Eastern. Thus, initial training has consistently been recognized and treated by both Eastern and ALPA as in the "service" of Eastern. All pilots hired by Eastern since March 4, 1989 have been placed on the payroll on their first day of training in accordance with this practice.[16] To illustrate the past application of this provision, I enclose as Attachment I copies of training and personnel records for four pilots which show that historically a new

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[14] In an effort to attract qualified new hire pilots during the strike, Eastern has such pilots salaries somewhat higher than those specified in the agreement.

[15] On their first of training new hire pilots are issued an employee identification number and an identification card which is identical to those of all Eastern employees.

[16] Eastern begins deducting all applicable taxes (*i.e.*, federal and state withholding and social security taxes) and begins paying unemployment insurance commencing with a new hire pilot's first day of training. New hire pilots also become eligible for employee passes on their first day of training.

hire pilot's date of employment for the purpose of semi-annual pay increases required by the Eastern-ALPA agreement, *i.e.*, "pay progression date," is also the first day the pilot reports to training.

12. ***New Hire Pilots In Training At Eastern Have Always Been Placed On The Seniority List And Have Accrued Seniority From Their First Day of Training.*** Section 18-B of the Eastern-ALPA Agreement, attached hereto as Attachment J, provides:

> Except as provided in Section 19 of this Agreement, seniority shall begin to accrue from the date a pilot is first placed on the payroll on regular pilot status, at which time he will be given a concurrent seniority number and from which date seniority shall continue to accrue during his period of service.

Pursuant to this provision, during my entire tenure at Eastern, new hire pilots always have been placed on the Eastern pilot seniority list as of their first day of training.[17] This practice has continued unchanged as to all pilots hired by Eastern since March 4, 1989. To illustrate the past application of this provision, I enclose as Attachment K, two separate intercompany memoranda which record the assignment of seniority dates and numbers to new hire pilots in training, always as of their first day of training. The ALPA MEC Chairman at that time (L.D. Schulte or J.J. Bavis) is shown as a recipient of each memorandum.

13. ***Under the Eastern-ALPA Agreement, A Pilot's "Service" At Eastern Commences From The First Day Of Training.*** In my twenty-five year experience at Eastern, the "date of hire" of a pilot has always been considered by both Eastern and ALPA to be the date he reports

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[17] In fact, a new hire pilot's relative seniority within his training class will be used to award him or her initial domicile assignment, subject only to the positions available at the time.

for training; "service" as a pilot has always been calculated to run from that date of hire for all purposes. For example, pursuant to Documents 90 ("A Plan") and 91 ("B Plan") (*see* Attachments L and M) a pilot's date of hire controls accrual of service credits under both of Eastern's pilot pension plans. To illustrate, Attachment N, Eastern pension information reports and training records on three individual pilots, demonstrates that the original employment date and active service date for pension calculation purposes are calculated from the first day of training. Pursuant to Section 16(A)(1) of the Agreement ("Vacations") (Attachment 0), a "newly employed pilot" accrues vacation days commencing with his or her first day of training. Pursuant to Section 38 ("Sick Leave") (Attachment P), pilots also accrue sick leave "for each month of service" which commences with the first day of training. Similarly, under Document 12, Paragraph 13 of the Eastern-ALPA Agreement (Attachment Q), a pilot becomes eligible for participation in Eastern's medical insurance plan after having "attained sixty (60) days of company active service," which service commences on the first day of training. For at least the past 25 years, with the knowledge and approval of ALPA, Eastern has treated all new hire pilots in initial training as in the service of Eastern for purposes of vacation accrual, sick leave accrual, pension service credit and eligibility for medical insurance. Thus, Mr. Babbitt's assertion that a new hire pilot in training is not covered by the Eastern-ALPA agreement is belied by the overwhelming practice of the parties. The fact that trainees do not pay union dues is not relevant because pilots are not required to pay union dues during the period they are probationary pilots.

IV. EASTERN HAS PROMISED ITS NEW HIRE PILOTS THAT THEY WOULD BE PERMANENT REPLACEMENTS AS OF THEIR FIRST DAY OF TRAINING.

14. Eastern began advertising and recruiting for new pilots on March 21, 1989, planning to start its first new

hire training class on March 27, 1989. All recruiting materials noted the existence of a labor dispute and stated that new pilots, once hired, would be permanent replacements for striking pilots; *i.e.*,that they would not be subject to displacement in favor of returning strikers.[18]

15. ***ALPA Proclaimed That Eastern Would Not Be Able To Recruit Sufficient Qualified Pilots.*** One of ALPA's propaganda themes to convince its members to remain on strike was that, unlike the circumstances during the ALPA strike against Continental Airlines in 1983, there were no longer sufficient qualified pilots available for Eastern to be able to replace them. *See* Attachment S. Indeed, during a conversation I had with Mr. Babbitt, in July 1989, he stated that ALPA had not expected that Eastern would be able to recruit sufficient qualified pilots to replace those on strike.

16. ***ALPA's Campaign To Discourage New Hire Pilots From Accepting Employment With Eastern.*** ALPA's response to Eastern's bankruptcy and announced intent to hire new pilots was prompt and hostile. ALPA publicly supported the sale of Eastern to third parties and publicly stated that it would not negotiate with, or return to work for, current Eastern management. *See* Attachment T. While ALPA proclaimed that Eastern could not hire sufficient pilots to operate, it nonetheless promptly launched a campaign to discourage potential applicants from even considering employment at Eastern. ALPA created and

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[18] Eastern was aware that commitments of permanent replacement status to new hire pilots could become an obstacle to an early settlement of the strike. Accordingly, still hopeful that striking pilots would return in large numbers before their replacements finished training, Eastern initially elected to make a change from its past practice described in ¶¶ 10-13, *supra*, and advised its initial recruits that they would become Eastern employees and attain permanent replacement status as pilots upon *completion* of their training, rather than upon its commencement, as in the past. A copy of Eastern's initial March 1989 "Fact Sheet" for pilot recruits is Attachment R.

distributed at least three special information packages for prospective pilot applicants which are enclosed as Attachments U, V, and W. These packages reflect the hostile comments and themes which ALPA had already begun to utilize by word of mouth among pilots to discourage applications at Eastern. Among the statements circulated by ALPA were the following:

> Eastern is attempting to hire SCABS .... Understand this: *the day you sign your name* in any way to a document at Eastern Air Lines you have committed suicide in your airline career... All new hires will be *furloughed before they ever get started* and will be in every airline's computer as a SCAB and forever unhireable.
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> Att. U, at p. 2 (emphasis added)
>
> Why are you not an Eastern employee until successful completion of training? ... Is the training program a numbers game to show the bankruptcy judge?
>
> Att. U, at p. 20
>
> According to ALPA, new pilots will be considered strike-breaking pilots whenever they report for *any* flight operations function—including recurrent or initial training if a strike is in progress.
>
> * * *
>
> Traditionally, flying a revenue trip has been the confirmation of strike-breaking status. However, ALPA now says that once a strike has begun, presence on the property for training of any kind will place pilots in a strike-breaking status.
>
> Att. V, Part 2 at page 6.

> ALPA—[you will be considered] a strike-breaker by all airline pilots *the day you start training.* A SCAB, like a tattoo, is forever.
>
> Att. W, at p. 12 (emphasis added)

17. ***The Results Of ALPA's Campaign.*** As of March 24 it was clear to Eastern's pilot recruiters that many qualified pilot candidates were available and interested but hesitant—largely because of ALPA's hostile rhetoric and threats by ALPA representatives that new hire pilots would be displaced promptly at the conclusion of the strike since they would not be considered employees until successfully completing training. While many highly experienced pilots who formerly flew for charter or freight or commuter carriers expressed interest, they also expressed a reluctance to terminate their current employment without firmer assurances from Eastern. Accordingly, Eastern decided to advise all applicants that it was offering employment and permanent replacement status, effective from the first day of pilot training, thus returning to Eastern's longstanding policy and practice. On March 27, 1989, I caused the recruiting literature to be revised accordingly. A copy of the revised "Fact Sheet" for pilot recruits is enclosed as Attachment X.

18. ***Eastern's Promises To The New Hire Pilots.*** All of Eastern's new hire pilot trainee classes have been repeatedly assured by senior management officials, including Mr. Bakes (President of Eastern), Mr. Matthews (Senior Vice President Human Resources), and Captain Frank Causey (Eastern's Vice President for Flight Operations during the period when all of the new hire training classes commenced) that they would be given seniority numbers and treated as permanent replacement employees from their first day of training. I firmly believe that such assurances have been absolutely essential to Eastern's recruiting and have helped to avoid any massive attrition from the train-

ing program in response to ALPA's threats and efforts at intimidation.[19]

V. ALPA's Threats Against Working Pilots.

19. Mr. Babbitt's suggestion that ALPA seeks to vindicate the rights of crossover pilots in this litigation is disingenuous. Babbitt Dec. ¶ 6. ALPA has made no secret of its contempt for pilots who crossed the picket line and returned to work, and has leveled a barrage of unflattering remarks at such pilots, calling them such names as "scabs," "crawl backs," and "scum." Attachment Y. In fact, ALPA has actively sought to discipline members who abandoned the strike, relying on reports from the then striking pilots in the field to compile a list of suspected strikebreakers for review by ALPA's Article 8 Committee, the group responsible for coordinating the punishment of strikebreakers for violation of ALPA's Constitution and Bylaws. ALPA also urged its members to draft and sign sworn statements that they had witnessed those pilots who dishonored the strike:

> [T]he Article 8 proceedings against scabs are ongoing in the Atlanta Base. We need signed statements from pilots who have made contact with scabs, talked to the scabs and seen the scabs at work. This is your chance to push people who have jeopardized your career in their own jeopardy. Please return any statements to us early next week.

Attachment Z; *see also* Attachments AA and BB. Thus, ALPA made it clear that pilots who returned to work for

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[19] During the course of their training program, Eastern's new hire pilots have been housed at various hotels in Miami. From the date our first trainee class arrived, striking ALPA pilots have been stationed at these hotels almost continuously. The striking pilots' apparent mission was to talk the trainees out of their interest in Eastern, whether by cajolery or coercion.

Eastern by signing the preferential recall list immediately became "scabs" subject to union discipline:

> [P]ilots who have called or gone in to have their names put on a recall list will be removed from the list of those eligible to draw strike benefit checks . . . [and] are considered to be scabs. . . . [T]he act of signing up for recall subjects every pilot doing so to the filing of Article 8 charges and the implementation of a minimum $10,000.00 fine, even if the individual has resigned from ALPA.

Attachment CC; *see also* Attachment DD. Indeed, as already found by the United States Bankruptcy Court for the Southern District of New York, ALPA repeatedly manifested its hostility to the veteran Eastern pilots who elected to work during the strike:

> ALPA's assertion that it has commenced the lawsuit [seeking to enjoin Eastern's lease of aircraft with crews from another company for the purpose of performing Eastern flying during the strike] on behalf of and to benefit its employees who desire to return to work with Eastern is disingenuous and in contradiction to ALPA's avowed strike policies which are calculated to discourage any of its members from returning to work for Eastern. Returnees are treated by ALPA with the utmost contempt and subject to disincentive sanctions.

Findings of Fact and Conclusions of Law, *Eastern Air Lines, Inc. v. Air Line Pilots Association International (In re Ionosphere Clubs, Inc.)*, Adversary Proc. No. 89-6143A (Bankr. S.D.N.Y. entered October 4, 1989) at 8 ¶ 27 (Attachment EE hereto).

VI. EASTERN'S STATUTORY RIGHT TO SELF HELP WOULD BE MEANINGLESS IF IT CANNOT TREAT NEW HIRE PILOTS AS PERMANENT REPLACEMENTS FROM THEIR FIRST DAY OF TRAINING

20. As discussed in ¶ 16, ALPA's campaign to undermine Eastern's pilot recruiting program focused heavily on the lack of job security at Eastern and the fact that trainees would be "at risk." In my view, and as attested by the Declarations of 49 new hire pilots, Eastern would have been unable to attract the number of qualified pilots who have applied and been hired to fill pilot positions without a promise of permanent replacement status from the first day of training. This is particularly true in light of the high experience level of those pilots. A number of these pilots had established themselves with substantial seniority at smaller air carriers (charters, freight and commuter carriers) or as corporate pilots, but were frequently regarded as "too old" to be hired in junior position at major carriers, where they would have to spend many years to gain sufficient seniority to fly as Captain. Not knowing when the ALPA strike might end, many such pilots inquired extensively to assure themselves that they would be guaranteed permanent replacement status from their first day of training and would not be "at risk" at any time at Eastern once they had sold their businesses or resigned their prior position, given up years of seniority, and in some cases relocated themselves and their families. Thus, in the absence of a promise of permanent replacement status from the first day of training, Eastern's statutory right to use permanent replacements to continue operation would be rendered meaningless.

21. The reliability of Eastern's promise of permanent replacement status to all of its new hire pilots is also crucial to Eastern's ability to conduct future negotiations with ALPA. At some point two or three or five years from now, Eastern will again face negotiations with ALPA on the next contract. During those negotiations, ALPA

will surely threaten a strike if its demands are not met; Eastern will be at a severe disadvantage if it is not equally able to assert an intent to operate and to hire replacement pilots if necessary. I believe that if Eastern dishonors its promises to its new hire pilots in this dispute, it will be unable to recruit and hire replacement pilots during any future strike. ALPA would surely make all potential applicants aware of the unreliability of Eastern's promises. Eastern's theoretical right to operate would be an empty threat and Eastern would then be at ALPA's mercy to either capitulate at the bargaining table or to cease operations for the duration of any strike. Thus, failure to honor its commitments this time would totally emasculate Eastern in future collective bargaining with any of its labor unions. Eastern's ability to conduct future negotiations effectively thus compels it to honor its present commitments of permanent replacement status to new hire pilots from their first day of training.

VII. IRREPARABLE INJURY

22. Mr. Babbitt's Declaration wrongly asserts that "striking pilots can be requalified within a matter of days." Babbitt Dec. at ¶ 11. In fact, having now been out of the cockpit for over 10 months, it would take a minimum of 10 days of training, to requalify a returning striker, provided that the pilot were returning to his or her prestrike category position. However, the pilot vacancies for which the pilots in training, as of November 22, were being trained were among the most junior pilot positions available, including 105 B-727 second officers and 40 DC-9 first officers. These were not the prestrike category positions of either the 227 most senior strikers nor the 94 unrecalled crossover pilots whose names remained on the preferential recall list as of ALPA's November 22 offer. Accordingly, upon recall such senior returning strikers would require full retraining, a process requiring up to 30 days and costing Eastern (depending upon whether the pilot requires requalification, transition or upgrade training) any where

from $9000–$35,000 per pilot,[20] and, due to the ongoing training of working pilots, it would take months to complete the retraining of over 220 returning pilots. Most importantly, if this Court orders Eastern to displace the 227 pilots who were still in training on November 22, Eastern will be forced to cancel hundreds of flights, thus causing great inconvenience to the travelling public, and costing Eastern millions of dollars in lost revenue, which it desperately needs, and significant amounts of goodwill at a time when it is struggling to recapture marketshare and to reorganize. Eastern will be forced to cancel flights because, as stated above, most of the returning strikers affected by such an order will require up to 30 days of training before they can resume line flying. However, it is my firm conviction that a significant number of the affected new hire pilots, knowing that they will be furloughed by Eastern, will resign their employment with Eastern before the returning strikers can be trained.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 16th day of January 1990.

/s/ Alan C. Gibson
Alan C. Gibson

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[20] Moreover, at the time of the next annual bid, which the Eastern-ALPA agreement provides must be effective between June 1 and August 1 of each year, these senior returning pilots will be able to assert their seniority to obtain a higher permanent category positions, necessitating additional training for them and, due to the "ripple effect" of such pilot staffing changes, the retraining of hundreds of other pilots as well.

APPENDIX F

(ATTACHMENTS OMITTED)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 89-1630-CIV-DAVIS

EASTERN AIR LINES, INC.,

Plaintiff,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and EASTERN AIR LINES MASTER EXECUTIVE COUNCIL

Defendants.

DECLARATION OF KAREN AVERILL

I, Karen Averill, do hereby swear and affirm as follows:

1. I served as the coordinator of pilot recruiting at Eastern Air Lines, Inc. ("Eastern") from March 14, 1989 until August 11, 1989, when Eastern announced that it was terminating its pilot hiring program in light of the large influx of crossover pilots during the previous few weeks. While the pilot hiring program was ongoing, I was responsible for the overall administration of the process by which Eastern recruited, screened, and interviewed applicants for pilot positions at Eastern. Prior to March 14, 1989, I was employed by Eastern for approximately three years as a professional recruiter for prospective employees in all job categories.

2. On March 21, 1989, two and a half weeks after ALPA commenced its strike against Eastern, Eastern began to

advertise that it was hiring pilots to replace its striking pilots. The advertisements clearly stated that Eastern was offering full-time, permanent positions to new hire pilots. A copy of Eastern's standard pilot recruiting advertisement is enclosed as Attachment A; a list of the newspapers and dates on which this ad was run is enclosed as Attachment B.

3. Between March 21 and August 11, Eastern received more than two thousand employment applications from persons who fully satisfied, and indeed, in most instances, far exceeded Eastern's minimum qualifications for hire as a line pilot.[1] However, aware of the close scrutiny that the new hire pilots would receive, Eastern developed procedures to ensure that the pilots it hired would meet the highest standards. In general, once a person's employment application was received, a pilot recruiter would contact the applicant and conduct a telephone screening interview to determine whether the pilot satisfied Eastern's minimum qualifications. If the pilot recruiter determined that the pilot applicant satisfied Eastern's minimum qualifications, Eastern sent the applicant an information package, which contained an employment application, a fact sheet, and other information about Eastern, and scheduled a pre-hire interview with the applicant at the earliest available date (generally within a few days after the applicant received the information package).

4. The pre-hire interviewing process was rigorous, consisting first of a group briefing conducted by a pilot re-

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[1] Every pilot hired by Eastern during the strike was already licensed by the Federal Aviation Administration as an airline transport pilot or a commercial pilot with multiengine rating and instrument rating. In addition, each applicant had to possess the following minimum qualifications in order to receive further consideration for employment at Eastern: (i) 1,200 hours of fixed wing flight time, and (ii) 200 hours of pilot in command of multiengine aircraft (or military equivalent) flight time.

cruiter, followed, for the remainder of a full day, by a series of individual interviews to ascertain whether the applicant possesed the qualifications and proficiencies necessary to be hired as a pilot by Eastern. If the applicant was determined to be fully qualified, he was offered a permanent pilot position at the end of the interview process and, if the offer was accepted, a mutually agreeable date was established for the beginning of his initial training, which was, however, contingent upon the applicant's successful completion of a background check and a physical examination.

5. In the three years I have been employed by Eastern, a new hire pilot was always placed on the payroll and the Eastern pilot seniority list as a permanent Eastern employee beginning with his or her first day of training. However, for approximately 10 days following the commencement of ALPA's strike, Eastern initially told prospective new hire pilots that they would become Eastern employees and assume permanent replacement status as pilots only upon completion of their training.

6. Shortly after Eastern began to advertise for new pilots, ALPA initiated an aggressive effort to discourage potential applicants from applying for pilot positions at Eastern and to encourage those who had accepted pilot positions not to report for training or to leave Eastern. Among other things, ALPA emphasized that new hire pilots would not be considered permanent Eastern employees until they had completed training and threatened that, until such time, they could and would be displaced if ALPA elected to end its strike.

7. ALPA's efforts to discourage persons from applying for pilot positions at Eastern and from completing training once they had been hired (which are described more fully in the accompanying Declaration of Alan C. Gibson), created widespread concern and confusion on the part of actual and potential applicants as to the security of new hire

pilot positions at Eastern. Many qualified pilot applicants told me, and other pilot recruiters that, because of ALPA's intimidation, including threats by ALPA that new hire pilots in training were not permanent employees and would be displaced if ALPA elected to end its strike, they did not desire to pursue further their interest in a pilot position at Eastern. During those initial weeks of the pilot hiring program, approximately 100 pilot applicants, who had been sufficiently interested in Eastern (despite ALPA's strike) to apply for a pilot position, appear for a pre-hire interview and accept an offer of employment, subsequently failed to appear for their scheduled class date.

9. Consequently, to insure that it would continue to attract qualified pilot applicants, on March 27, 1989, Eastern revised its fact sheet and returned to its long established practice of offering permanent employee status to pilots effective their first day of training. Eastern then recontacted pilot applicants who had earlier decided not to pursue further their interest in a pilot position at Eastern (including those pilots who had failed to report for a scheduled class date), and informed them that new hire pilots would be considered permanent employees as of their first day of training. Many of these persons then decided to reschedule their training class dates.

10. It is my firm belief that Eastern's decision to return to its established practice effectively defused concern on the part of pilot applicants and trainees as to the permanent nature of their positions, and, in my view, made it possible for Eastern to attract qualified pilot applicants who, without a guarantee of a permanent employee status as of their first day of training, would not otherwise have decided to apply for and to accept employment at Eastern.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 16th day of January, 1990.

/s/ Karen Averill
Karen Averill

APPENDIX G

Railway Labor Act Provisions

45 U.S.C. § 151, Fifth provides as follows:

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

45 U.S.C. § 181 provides as follows:

§ 181. Application of subchapter I to carriers by air

All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government,

and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Supreme Court, U.S.
FILED
AUG 16 1991
OFFICE OF THE CLERK

(2)

No. 90-1902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EASTERN AIR LINES, INC.,
Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the district court and the court of appeals correctly held that the Railway Labor Act prohibits a carrier from refusing to reinstate former striking pilots to available pilot vacancies by designating new hire pilot trainees as permanent replacement employees even though the trainees had not performed any pilot services, occupied any pilot position, or replaced any striking pilot when the strikers unconditionally offered to return to work.

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IN THE

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OCTOBER TERM, 1991

No. 90-1902

EASTERN AIR LINES, INC.,
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AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

This case concerns a narrow issue under federal collective bargaining law specific to both the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, and the circumstances involved in the hiring and training of pilots in connection with airline strikes.

In 1989, hundreds of pilots represented by the Air Line Pilots Association, International ("ALPA") unconditionally offered to return to work at Eastern Air Lines, Inc. ("Eastern") following a lawful pilot sympathy strike. At the time the former strikers sought reinstate-

ment, Eastern maintained hundreds of unfilled pilot positions and urgently needed hundreds of additional qualified pilots to operate its scheduled passenger flights. Eastern nonetheless refused to reinstate returning strikers and, instead, "reserved" its existing and future pilot vacancies for a pool of new hire pilot trainees who had not occupied any Eastern pilot position during the strike, who had not replaced any striking pilot in Eastern's flight operations, and who did not perform any Eastern pilot services until they completed pilot training months after strikers unconditionally offered to return to work.

The United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit declined to expand the permanent replacement doctrine rooted in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), in order to sanction Eastern's wholesale refusal to reinstate former strikers to post-strike pilot vacancies. Following an indistinguishable decision of the Eighth Circuit, the court of appeals held that the Railway Labor Act does not permit an employer to permanently replace its entire striking work force at the onset of a strike by amassing a pool of trainees who do not and cannot replace strikers or perform work for the employer until months after the strike has ended. The Petition, in turn, explicitly invites the Court to review this case in order to overturn a uniform interpretation of the Railway Labor Act among the circuits, Pet. 13-14, and to substantially expand the economic weapons available to an employer under *Mackay Radio* and the Court's permanent replacement decisions, Pet. 8-9.

We show below that the Eleventh Circuit's fact-bound and carefully reasoned decision creates no conflict among the circuits, is entirely consistent with this Court's permanent replacement decisions, and therefore presents no issue that warrants this Court's review.

STATEMENT OF THE CASE

Statement of the Facts

The factual background of this case is accurately set forth in the Eleventh Circuit's opinion below. App. 2a-4a. ALPA has served as the authorized collective bargaining representative for Eastern pilots for over 45 years. On March 4, 1989, the International Association of Machinists ("IAM")—the collective bargaining representative of Eastern's mechanics and ground service employees—commenced a lawful primary strike at Eastern. On the same day, ALPA and nearly all of the Eastern pilots decided to honor the IAM picket lines and to initiate a lawful sympathy strike in support of the IAM. *See Eastern Air Lines, Inc.* v. *Air Line Pilots Ass'n, Int'l*, 710 F.Supp. 1342 (S.D. Fla.), *aff'd*, 132 L.R.R.M. (BNA) 2392 (11th Cir. 1989).

After failing to obtain an injunction prohibiting Eastern pilots from engaging in a sympathy strike, Eastern, under the control and direction of Frank Lorenzo and the Texas Air Corporation, embarked on a scheme to oust ALPA and to "replace" its entire striking pilot work force with as many new hire pilots as Eastern could recruit. As part of that plan, Eastern extended employment offers to over 1200 pilot recruits to fill present and future staffing needs. Eastern's employment offers omitted any reference to existing RLA caselaw holding that trainees do not replace striking employees or attain permanent replacement status under the RLA until they complete training and actually perform employee services on a carrier's passenger flights in revenue service. App. 47a.[1]

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[1] Eastern submitted a series of self-serving declarations below in which certain trainees subject to the district court's decision in this case signed on to Eastern's *post hoc* contention that new hires would not have accepted Eastern's employment offers "unless they were treated as permanent replacements from the first day of training." Pet. 4 n.3. The record, however, does not remotely establish that Eastern could not have continued operations during the strike without such guarantees. *See infra* pp. 20-22.

Eastern periodically entered its pilot recruits in a new hire training program administered by Eastern under Federal Aviation Administration ("FAA") regulations. The training program included ground school instruction, flight simulator training, and initial operating experience ("IOE") flights under the direction of Eastern and/or FAA flight instructors. *See generally* 14 C.F.R. §§ 121.403-09 (1991) (describing ground school and simulator training); *id.* § 121.424 (describing IOE). Under FAA requirements, a prospective pilot cannot perform pilot services unless he or she successfully completes a series of FAA examinations, obtains an FAA pilot certificate that permits the new hire to operate Eastern aircraft in Eastern revenue operations, and secures a release from the FAA *after* successfully completing IOE training flights. *See* 14 C.F.R § 121.433. A pilot trainee recruited by Eastern during the strike thus could not occupy any Eastern pilot position or replace any striking pilot in Eastern revenue operations unless and until the recruit completed each of these FAA requirements. App. 3a.

Eastern's trainees required a minimum of eight weeks to complete ground school and simulator training under Eastern's training program and 10 to 25 additional hours of IOE training flights aboard Eastern aircraft before they could perform pilot services for Eastern. App. 2a-3a. Hundreds of Eastern's pilot recruits, however, remained in training for over four months before they secured an FAA release to perform Eastern revenue flying. Other pilot recruits waited for weeks or months after they accepted Eastern's employment offers before even beginning their new hire pilot training. The pilot trainees who successfully completed the entire training cycle commenced employee services for Eastern and replaced striking pilots by filling pilot positions in Eastern revenue operations. App. 9a.

In early August of 1989, hundreds of striking Eastern pilots made unconditional offers to return to work. App.

3a. At that time, Eastern maintained hundreds of pilot vacancies and required hundreds of additional pilots to meet immediate pilot staffing needs as it expanded operations following the IAM strike. App. 3a, 22a.[2] Despite its substantial and immediate need for qualified pilots, Eastern announced on August 11, 1989 that it would no longer reinstate former strikers to its unfilled pilot positions and that former strikers would be placed on a preferential recall list while Eastern indefinitely "reserved" its pilot vacancies for the trainees. By August of 1989, more than 800 of Eastern's pilot recruits had not completed the FAA-required training cycle, and many recruits had not even commenced pilot training. App. 3a, 22a.[3] These 800 trainees had not performed pilot services for Eastern, occupied any Eastern pilot position, or replaced any striking pilot in Eastern flight operations. Eastern required months to train this August trainee group, and many did not perform pilot services for Eastern until February or March of 1990.

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[2] From September of 1989 into 1990, for example, Eastern subcontracted substantial Eastern flight operations to its corporate affiliate Continental Airlines, Inc. ("Continental") because it lacked enough qualified pilots to operate its flight schedule. *See In re Ionosphere Clubs, Inc.*, 114 Bankr. 379, 385 (S.D.N.Y.), *aff'd in part, rev'd in part*, 922 F.2d 984 (2d Cir. 1990), *petition for cert. pending*, No. 90-1482. Eastern thereby utilized hundreds of Continental pilots to perform Eastern revenue flying during this period in order to reserve Eastern pilot vacancies for its new hire trainees, despite the availability of qualified former strikers. *See id.* In addition, both during and for months after the strike, Eastern unilaterally implemented scheduling and other work rule changes that permitted Eastern to staff its flight schedules with hundreds of fewer pilots than required under the ALPA-Eastern collective bargaining agreement. *See generally In re Ionosphere Clubs, Inc.*, 114 Bankr. at 385.

[3] Eastern suggests that its non-employee trainees somehow "filled" Eastern pilot positions while they remained in training because Eastern designated which aircraft equipment trainees would fly if and when they completed training. Pet. 10. In fact, as both the district court and the Eleventh Circuit found, Eastern maintained

On November 22, 1989, ALPA terminated the pilot strike, and all remaining strikers unconditionally offered to return to work. At the conclusion of the pilot strike, approximately 330 of Eastern's new hire pilot recruits remained in pilot training, and Eastern continued to require hundreds of additional qualified pilots to operate scheduled and planned Eastern revenue flights. App. 3a. Again, however, Eastern refused to fill post-strike pilot vacancies with returning strikers and "reserved" all available pilot positions for its new hire trainees (if and when they successfully completed training) before reinstating a single striking pilot from the preferential recall list. *Id.* In sum, as the court of appeals explained, "[f]rom at least early August, 1989, until August 2, 1990, when the district court granted ALPA's motion for a preliminary injunction, Eastern filled vacant pilot positions by giving preference to its new hire pilots, rather than Eastern's striking pilots who had unconditionally offered to return to service." App. 3a; *see also* App. 22a.

The district court and the Eleventh Circuit also found that Eastern could have filled pilot vacancies during and after the strike more quickly and cheaply by requalifying its licensed and experienced former strikers rather than reserving available pilot positions for months while new hire pilot recruits completed initial pilot training. App. 13a-14a, 27a-28a. In August of 1989, most former strikers could have been requalified to fill their pre-strike pilot positions in a few days. *See* 14 C.F.R. § 121.439. Even in November, Eastern could have requalified returning strikers for their pre-strike positions in approximately five days and for any position in "up to" 30 days. *See* 14 C.F.R. § 121.433(c). Eastern's pilot trainees, by

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hundreds of unfilled pilot vacancies when striking pilots sought reinstatement and Eastern's pilot trainees had not occupied or filled *any* Eastern pilot position or replaced *any* striking pilot when Eastern refused to reinstate strikers. App. 3a, 20a-22a.

contrast, often required several months of training before they could occupy Eastern's unfilled pilot positions and perform work to help Eastern continue operations during or after the strike. App. 13a-14a. As a result, Eastern's policy of reserving available pilot positions for trainees rather than reinstating licensed former strikers with years of Eastern pilot experience actually hampered Eastern's ability to operate both during and after the strike.

Course of Proceedings and Disposition Below

On cross-motions for partial summary judgment and ALPA's motion for a preliminary injunction, the district court held that the RLA prohibited Eastern from refusing to reinstate returning strikers to pilot vacancies by treating its non-employee pilot trainees as permanent replacements. App. 20a-29a. The district court explained that strikers remain statutory employees under the RLA both during and after a strike and are presumptively entitled to immediate reinstatement at the end of the strike. App. 22a-24a. The limited exception to this rule derived from *Mackay Radio*, the court explained, permits employers to delay reinstatement where strikers' "jobs have been *filled* by workers hired as permanent replacements during the strike in order for the employer to continue operations." App. 23a (emphasis added). In cases involving permanent replacement employees who actually *occupy* job positions during the strike, the Court has thus determined that "the employer's interest in continuing operations is 'deemed to outweigh the damage to concerted activities caused by permanently replacing strikers.'" App. 23a (quoting *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 232 (1963)).

As the district court explained, however, this Court has never suggested—under the RLA or otherwise—that employers can refuse to reinstate returning strikers by reserving hundreds of available post-strike vacancies for trainees who did not perform any work or fill the job positions of any striking employee during the strike.

App. 23a-24a. In the absence of such binding authority, the district court followed the Eighth Circuit's decision in *Independent Federation of Flight Attendants* v. *Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir. 1987), *cert. denied in rel. part*, 485 U.S. 958 (1988), which held, under indistinguishable circumstances, that the RLA prohibits carriers from refusing to reinstate former strikers to post-strike job vacancies by treating airline trainees as permanent replacements. App. 26a-29a. The district court stayed its preliminary injunction pending appeal after Eastern agreed to recall 50 former strikers under the court's decision.

On appeal, the Eleventh Circuit agreed that the *Mackay Radio* doctrine encompasses new hires or crossovers who actually occupy the job positions claimed by returning strikers and that federal courts have been reluctant to expand *Mackay Radio* to further dilute the rights of returning strikers. App. 6a-7a. As the court of appeals explained, moreover, the Seventh and Eighth Circuits have looked to the RLA's unique statutory definition of covered employees[4] to hold that airline trainees neither enjoy the right to strike nor attain the status of permanent replacement employees until they complete training and perform actual employee services for the carrier. App. 9a-12a (discussing *Trans World*, 819 F.2d at 845-47 and *Air Line Pilots Ass'n, Int'l* v. *United Air Lines, Inc.*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987)).

Given this interpretation of the RLA, the Eleventh Circuit held that Eastern cannot refuse to reinstate striking pilots by treating its trainees as permanent re-

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[4] The RLA limits protected employee status to persons "in the service of a carrier . . . who perform[] any work defined as that of an employee or subordinate official," 45 U.S.C. § 151, Fifth, and to "every air pilot . . . who performs any work as an employee . . . subject to [the carrier's] continuing authority to supervise and direct the manner of rendition of his service," *id.* § 181.

placement employees because the trainees "were not actually performing the work ordinarily discharged by the former strikers" when the strikers unconditionally returned to work. App. 13a.[5] Any contrary holding, the Eleventh Circuit reasoned, would strike a "fundamental blow to the union and the collective bargaining process," App. 18a, because it would allow an employer to replace its entire striking work force—without regard to actual business needs during or after the strike—by designating as permanent replacements a pool of trainees who could not and would not perform employee services until some date months in the future. App. 17a-18a.[6]

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CREATE ANY CONFLICT AMONG THE CIRCUITS

Eastern's principal argument for invoking this Court's review is that the decision below creates a conflict among the circuits concerning the status of trainees during airline strikes in light of the former Fifth Circuit's decisions in the *National* litigation. Pet. 9. In fact, the Eleventh Circuit's decision explicitly follows the uniform interpretation of the RLA by every circuit that has addressed the trainee issue presented in this case and carefully distinguishes the Fifth Circuit's decisions in the *National* litigation. App. 9a-17a.

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[5] In doing so, the Eleventh Circuit treated the former Fifth Circuit's decisions in *National Airlines, Inc.* v. *International Association of Machinists*, 416 F.2d 998 (5th Cir. 1969) (*"National I"*) and 430 F.2d 957 (5th Cir. 1970) (*"National II"*), *cert. denied*, 400 U.S. 992 (1971), as binding precedent and distinguished both decisions. App. 15a-17a.

[6] The Eleventh Circuit panel subsequently denied Eastern's Petition for Rehearing and no member of the panel or active Eleventh Circuit judge requested a poll on Eastern's Suggestion of Rehearing En Banc. App. 31a-32a. In January of 1991, Eastern ceased all airline operations, laid off its pilots, and began to liquidate its remaining assets.

1. First, as the court of appeals explained, the Eighth Circuit's decision in *Trans World* is the only other appellate decision to consider an RLA employer's attempt to treat non-employee trainees as permanent replacements. App. 10a-11a. In *Trans World*, the carrier hired and trained large numbers of would-be replacements for striking flight attendants, and over 450 of the new hires had not completed FAA-required training or commenced employee services at the conclusion of the strike. *See Trans World*, 819 F.2d at 841. As in this case, the carrier refused to reinstate former strikers to hundreds of post-strike job vacancies and reserved its job vacancies for flight attendant trainees who had not occupied any job position during the strike. *See id.* The carrier argued that the *Mackay Radio* exception permitted it to treat the flight attendant trainees as permanent replacement employees on their first day of training because the carrier believed that it could not attract a sufficient number of strike replacements without promising to do so. *See Independent Fed'n of Flight Attendants* v. *Trans World Airlines, Inc.*, 643 F.Supp. 470, 479 (W.D. Mo. 1986), *aff'd in rel. part*, 819 F.2d 839 (8th Cir. 1987), *cert. denied in rel. part*, 485 U.S. 958 (1988).

The Eighth Circuit held that the carrier's attempt to reserve post-strike vacancies for its trainees was inconsistent both with the RLA's statutory limitation on employee status and the rationale underlying this Court's permanent replacement decisions. As the Eighth Circuit explained:

> The trainees in question, although hired by TWA, never performed any services for TWA under its supervision prior to the Union's offer to return to work. Thus, they cannot be considered employees within the meaning of the RLA. . . . The RLA does not extend its coverage based upon the employer's labelling of persons as employees or the payment of salary. Rather, RLA coverage is determined by the *work the person performs* under the supervision of

> the employer. . . . Thus, clear statutory language supports the conclusion that the trainees are not employees protected by the RLA because these trainees were not "performing any work" of the carrier by any stretch of the imagination.

Trans World, 819 F.2d at 845-46; *see also id.* at 846-47 (explaining that the balance of employer and union interests struck in *Mackay Radio* does not permit an employer to reserve post-strike job positions for trainees who did not and could not perform employee services during the strike).[7]

The court of appeals held below that "[t]he facts of *Trans World* are indistinguishable from those in this case," App. 10a; *see also* App. 26a-27a,[8] and followed

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[7] The Eighth Circuit also held that the carrier could not treat crossover employees (who actually performed work and occupied employee positions during the strike) as permanent replacements under the RLA. *See Trans World*, 819 F.2d at 843-45. While this Court subsequently reversed the Eighth Circuit's crossover holding, the Court explicitly declined to grant certiorari to review the Eighth Circuit's trainee holding. *See Trans World*, 489 U.S. at 432; *see also* 485 U.S. 958 (1988).

[8] Eastern's attempt to distinguish the facts of *Trans World*, Pet. 13, 14 n. 13, creates no basis for reviewing the decision below. Eastern asserts that the Eastern training program conferred "employee" status on new pilot trainees because, on the first day of training, Eastern new hires are placed on the payroll, receive a "date[] of hire" utilized for calculating certain contractual benefits after they successfully complete training, and are assigned a number on the Eastern pilot seniority list. Pet. 4-5, 14 n.13. Even if Eastern correctly describes its treatment of new hire trainees (and we demonstrated before the courts below that it does not), Eastern's employment practices cannot transform new hire trainees into permanent replacement employees under the RLA. *See Trans World*, 819 F.2d at 846 (holding that such factors are "irrelevant under the RLA" because permanent replacement status under the RLA does not depend "upon the employer's labelling of persons as employees or the payment of salary"). The National Mediation Board has also uniformly held that carriers cannot confer employee status on airline trainees simply by providing them with a salary, seniority accrual

Trans World to hold that Eastern could not prefer its pilot trainees to former strikers in filling post-strike pilot vacancies. App. 13a. Accordingly, the only circuits to consider the trainee issue raised in the Petition have held the RLA does not permit carriers to treat trainees as permanent replacements unless and until the trainees actually occupy the job positions of striking employees.

2. Eastern concedes that the Eleventh Circuit "followed the Eighth Circuit's *Trans World* decision," Pet. 13, but contends that *Trans World* and the decision below are "wrong," *id.*, because the question of "whether new hires qualify as RLA 'employees' " is "irrelevant" to whether an RLA employer can treat trainees as permanent replacement employees. Pet. 13-14. But that is simply not the case. The RLA's unique statutory definition of covered employees governs the ability of *both* employers *and* unions to enlist the support of trainees during a strike. In *United*, for example, the carrier threatened to discharge a group of over 500 pilot trainees who joined a pilot strike after accepting the carrier's unconditional offers of employment but before completing pilot training. *See United*, 802 F.2d at 892. Notwithstanding the importance of the trainees to the union's strike effort, the Seventh Circuit rejected ALPA's claim that the trainees maintained the right to strike under the RLA once they accepted employment offers and commenced training. Instead, the Seventh Circuit held that the carrier could discharge all striking trainees because the trainees had not attained "employee" status under the RLA's unique statutory provisions. *United*, 802 F.2d at 911-14.

The decision below merely confirms that the RLA's statutory restrictions on employee status govern *both* a

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or any other employment benefit. *See, e.g., Rosenbalm Aviation*, 15 N.M.B. 313 (1988); *Midway Commuter*, 15 N.M.B. 278 (1988); *Simmons Airlines*, 15 N.M.B. 228 (1988).

union's ability to exert economic pressure by attempting to include trainees in its strike *and* a carrier's ability to exert economic pressure by attempting to "replace" striking employees with trainees who perform no employee services and occupy no job position during a strike. Any other outcome would permit RLA carriers to displace an entire striking workforce by promising permanent positions to trainees while prohibiting RLA unions from persuading such trainees to join the strike. Nothing in the RLA indicates that Congress intended to impose such a drastically unbalanced regime of self-help rights on unions and carriers.[9]

3. Finally, this interpretation of the RLA by the Seventh, Eighth and Eleventh Circuits does not conflict with the former Fifth Circuit's decisions in *National I* and *National II*. The *National* litigation concerned the rights of RLA employees who were discharged for engaging in an illegal wildcat strike, *see National I*, 416 F.2d at 1007, not the trainee issue presented in this case. In the decision below, the Eleventh Circuit treated *National I* and *National II* as binding precedent[10] and carefully distinguished both cases. App. 15a-17a. As a

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[9] As the court of appeals explained below:

> Acceptance of Eastern's analysis would result in the creation of two classes of common carrier employees; "permanent employees" entitled to the benefits and privileges of the RLA and bound by its duties and penalties, and a second class of "permanent employees" (the trainees) whose employer/employee relationship is not governed by the regulatory framework established by the RLA, and who are not extended the same benefits and obligations available to the other class of "permanent employees." No authority leads us to create such an anomalous situation.

App. 14a-15a.

[10] The Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit issued prior to October 1, 1981. *See Bonner* v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

result, Eastern's entire circuit conflict argument, Pet. 9-15, constitutes nothing more than a request that the Court grant certiorari to review an alleged "intracircuit" conflict and to overturn a circuit's interpretation of its own precedent.

As the court of appeals explained, moreover, the decision below is entirely consistent with *National II*. App. 15a-16a. Eastern asserts, as it did below, that the *National II* panel implicitly adopted an "offer and acceptance" standard for determining permanent replacement status under the RLA when it suggested in dicta that replacements must at least secure "fixed and irrevocable" arrangements with the employer. *National II*, 430 F.2d at 961. The *National II* opinion further explains, however, that former strikers are entitled to reinstatement unless their job positions have been *filled* by new hires who have actually "com[e] on the payroll" and "enter[ed] into service of the company" before strikers offer to return to work. *Id.* In any event, *National II* only involved prospective replacements who commenced employee services within a day or two after strikers sought reinstatement, and nothing in that decision permits carriers to refuse to reinstate former strikers to post-strike job vacancies for months while hundreds of unqualified new hires undergo training. App. 16a-17a, 25a-26a. Accordingly, Eastern's discussion of *National II* at most suggests that the former Fifth Circuit never addressed the trainee issue presented in this case and does not remotely demonstrate any conflict among the circuits.

Eastern's reliance on a district court decision in the *United* litigation, Pet. 12-13, is also misplaced. In *Air Line Pilots Association, International* v. *United Air Lines, Inc.*, 614 F. Supp. 1020 and 616 F. Supp. 849 (N.D. Ill. 1985), *aff'd in part, rev'd in part*, 802 F. 2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987), the district court granted permanent replacement status to a group of 539 trainees hired during a pilot strike on the

theory that *all* trainees, including the group of 500 striking trainees, became statutory "employees" protected by the RLA as soon as they accepted the carrier's offers of employment. *See* 616 F. Supp. at 851; 614 F. Supp. at 1041-43. On appeal, however, the Seventh Circuit rejected the rationale underlying the district court's replacement decision when it held that new hire trainees are not protected "employees" under the RLA as a matter of law. *See United*, 802 F.2d at 910-13; *supra* pp. 12-13. The district court's decision in *United* thus provides no support for Eastern's circuit conflict argument.

II. THE ELEVENTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S PERMANENT REPLACEMENT DOCTRINE

In an attempt to create a basis for reviewing this settled interpretation of the RLA among the circuits, Eastern also claims that the decision below (1) is contrary to this Court's opinion in *Trans World Airlines, Inc.* v. *Independent Federation of Flight Attendants*, 489 U.S. 426 (1989), and the Court's other permanent replacement decisions, Pet. 15, 18-20, (2) conflicts with administrative decisions under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, Pet. 16-18, and (3) prevents RLA carriers from continuing operations during a strike, Pet. 21-23. Eastern is wrong on all three counts.

1. First, nothing in this Court's permanent replacement decisions indicates that employers can prefer non-employee trainees to returning strikers in filling post-strike job vacancies. To the contrary, the Court has long held that returning strikers are presumptively entitled to reinstatement to their pre-strike job positions unless the employer can demonstrate a legitimate and substantial business justification for refusing reinstatement. *See Trans World*, 489 U.S. at 433-34; *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). In general, an

employer's refusal to reinstate returning strikers to post-strike job vacancies thus unlawfully discriminates against protected employee conduct under federal labor law because it "discourage[s] employees from exercising their rights to organize and to strike." *Fleetwood Trailer*, 389 U.S. at 378; *see Erie Resistor*, 373 U.S. at 232.

In *Trans World*, this Court simply confirmed the narrow privilege recognized in *Mackay Radio* that permits employers to delay the reinstatement of former strikers where " 'the jobs claimed by the strikers are *occupied* [at the end of the strike] by workers hired as permanent replacements during the strike in order to continue operations.' " *Trans World*, 489 U.S. at 433-34 (emphasis added) (quoting *Fleetwood Trailer*, 389 U.S. at 379 (1967)). In *every* permanent replacement case considered by the Court, however, strike replacements actually *occupied* strikers' jobs both during the strike and at the time the strikers sought reinstatement.[11] In that limited context, the Court has determined that the employer's interest in continuing operations with permanent replacements who work during the strike outweighs the reinstatement rights of strikers, *see Trans World*, 489 U.S. at 433-34; *Erie Resistor*, 373 U.S. at 232, and that the RLA does not require the employer to discharge one

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[11] *See Trans World*, 489 U.S. at 428 ("We decide today whether, at the end of the strike, an employer is required by the Railway Labor Act to displace *employees who worked during the strike* in order to reinstate striking employees with greater seniority.") (emphasis added; citation omitted); *id.* at 438 (explaining that "[t]he positions *occupied* by newly hired replacements . . . are simply not 'available positions' to be filled" by returning strikers) (emphasis added); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 493-97, 500, 504 n.8 (1983) (explaining that the employer has no statutory obligation to discharge permanent replacement employees who filled job positions during the strike to make room for returning strikers); *Fleetwood Trailer*, 389 U.S. at 379 (same); *Mackay Radio*, 304 U.S. at 345-46 (permitting the employment of permanent replacements who worked during the strike where necessary to continue operations).

group of employees (new hire replacements who worked during the strike) to make room for another group of employees (returning strikers), *see Trans World*, 489 U.S. at 433-34.[12]

Neither *Trans World* nor any other decision of this Court, however, suggests that *Mackay Radio* either protects trainees who did not and could not occupy job positions during the strike or permits employers to prefer such trainees over returning strikers in filling job vacancies when strikers unconditionally offer to return to work. As the courts below explained in detail, such trainees do not fall within the purposefully limited *Mackay Radio* rationale because they cannot perform employee services to help the employer continue operations during a strike and, as in this case, may not be able to perform employee services for months after strikers offer to return to work. App. 17a-18a, 26a-29a. Indeed, Eastern could have more easily continued operations during and after the strike by reinstating licensed former strikers instead of "reserving" job vacancies for months while its pilot recruits remained in training. App. 13a-14a. Accordingly, the Eleventh Circuit's decision neither conflicts with *Trans World* nor impinges on an employer's privilege under *Mackay Radio* to refuse to reinstate former strikers whose jobs are actually occupied by strike replacements.

2. So, too, the NLRA administrative decisions discussed by Eastern, Pet. 15-18, do not control the self-help rights of strikers and employers under the RLA.

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[12] Eastern wrongly claims that this Court's *Trans World* decision establishes that RLA employers enjoy greater self-help rights than employers governed by the NLRA. Pet. 15. In fact, the *Trans World* court merely pointed out that the self-help schemes differ under the two statutes, *see Trans World*, 489 U.S. at 439, citing a decision in which the Court held that RLA *unions*—unlike their NLRA counterparts—are not prohibited from engaging in secondary picketing. *See Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 481 U.S. 429 (1987).

"[T]he NLRA 'cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes.'" *Trans World*, 489 U.S. at 439 (quoting *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969)); *see also Chicago & N.W. Ry.* v. *United Transp. Union*, 402 U.S. 570, 579 n.11 (1971). The Court has thus long recognized that the range of self-help available to both unions and employers is not necessarily co-extensive under the two labor statutes. *See, e.g., Burlington Northern*, 481 U.S. at 446-48 (explaining that RLA unions retain the ability to engage in secondary picketing); *Jacksonville Terminal*, 394 U.S. at 393 (same).

As noted above, moreover, the circuits have uniformly held that the unique definition of "employee" status under the RLA governs the self-help rights of both RLA employers and employees and results in a different self-help regime than the self-help regime permitted under the NLRA.[13] *Compare United*, 802 F.2d at 911-12 (holding that the RLA's definition of employee status deprives airline trainees of the right to strike until they perform actual employee services) *with NLRB* v. *New England Tank Indus.*, 302 F.2d 273, 277-78 (1st Cir.) (holding that the NLRA provides individuals hired through offer and acceptance with the right to strike without first performing employee services), *cert. denied*, 371 U.S. 875 (1962). Eastern thus cannot create a basis for reviewing the interpretation of the RLA in the decision below by pointing to a handful of administrative decisions decided in the context of the NLRA's distinct stat-

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[13] Unlike the RLA, the NLRA expressly covers both applicants and all individuals "hired" by employers (through common law offer and acceptance) without regard to whether the new hire performs services for the employer. *See generally H. & F. Binch Co.* v. *NLRB*, 456 F.2d 357, 361-62 (2d Cir. 1972); *cf.* 29 U.S.C. § 152(3).

utory definition of employee status and its distinct regime of economic self-help.

In any event, the NLRA decisions cited by Eastern, Pet. 15-18, do not permit employers to refuse to reinstate former strikers to post-strike job vacancies for months while new hires complete training. At most, those agency or lower court decisions have accommodated the limited *Mackay Radio* exception to permit persons hired as replacements to commence employee services within a few days after the strike.[14] In *H. & F. Binch*, 456 F.2d at 357, for example, the Second Circuit, in an opinion by Judge Friendly, explained that an employer's offer to hire a would-be strike replacement does *not* relieve the employer of its statutory duty to reinstate former strikers unless the replacement's *actual* arrival on the job "will occur *at a reasonably early date.*" *Id.* at 362 (emphasis added). This standard does not "require a return-

[14] In each decision, the replacements performed "on the job" employee services either before the union's unconditional offer to return to work or were capable of beginning work within a few days thereafter. *See Solar Turbines, Inc.*, 302 N.L.R.B. No. 3, slip op. at 2-3 (March 11, 1991) (39 replacements scheduled for physical examinations and drug and alcohol testing within six or fewer days following the union's unconditional offer to return); *Home Insulation Serv.*, 255 N.L.R.B. 311, 311 (replacements capable of commencing work during the week the union called off its strike), *enf'd*, 665 F.2d 352 (5th Cir. 1981); *NLRB* v. *Cutting, Inc.*, 701 F.2d 659, 661-62 (7th Cir. 1983) (permanent replacements reported to work two days after strikers sought reinstatement); *Superior Nat'l Bank & Trust Co.*, 246 N.L.R.B. 721, 721 (1979) (two replacements reported within two days after strikers unconditionally offered to return to work). The alleged trainee cases cited by Eastern, Pet. 20, are also inapposite. The Sixth Circuit denied enforcement of *Kurz-Kasch, Inc.*, 286 N.L.R.B. 1343 (1987), and remanded the case for the precise determination of whether the employer maintained any post-strike vacancies when it refused to reinstate former strikers. *See Kurz-Kasch, Inc.* v. *NLRB*, 865 F.2d 757, 759-60 (6th Cir. 1989). *Anderson Clayton & Co.*, 120 N.L.R.B. 1208, 1214 (1958), involved trainees who performed actual revenue work for the employer while receiving on-the-job training.

ing striker to stand idly by and watch a job disappear" for months while new hires complete training. *Trans World*, 643 F. Supp. at 478 (applying the *H. & F. Binch* analysis to hold that replacements must commence employee services within two days after the strike to defeat the reinstatement rights of returning strikers).[15]

As a result, the Eleventh Circuit's refusal to permit Eastern to "reserve" post-strike vacancies for months after striking pilots sought reinstatement is fully consistent with even the most expansive interpretation of permanent replacement status under the NLRA.

3. Finally, the uniform interpretation of the RLA confirmed in the decision below does not prohibit carriers from either hiring permanent replacements under *Mackay Radio* or continuing operations during a strike. Pet. 18-24. No less than *Mackay Radio* and its progeny, the Eleventh Circuit's decision fully endorses the ability of employers to hire permanent replacements during a strike and to promise such replacements that they will not be discharged from job positions they occupy during the strike in order to make room for returning strikers. App. 9a. As Eastern itself acknowledges, Pet. 21 n.17, the *only* consequence of the decision below is to encourage RLA employers to begin hiring and training prospective replacements before the parties engage in self-help under the RLA and to complete the training of permanent replacements as soon as possible once a strike begins. *Cf. NLRB* v. *Brown*, 380 U.S. 278, 283-84 (1965) (dis-

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[15] Contrary to Eastern's repeated assertions, Pet. 19-23, the NLRA does not allow employers to offer replacements whatever special privileges the employer deems necessary to hire employees during a strike. *See, e.g., Erie Resistor*, 373 U.S. at 222 (holding that superseniority benefits for strike replacements are unlawful under the NLRA even though the "employer asserts that these additional benefits are necessary to continue his operations during a strike"); *NLRB* v. *Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985).

cussing the ability of employers to engage in strike preparations). Such trained new hires will actually occupy the job positions of striking employees, help the employer continue operations, and attain permanent replacement status from the beginning of a strike. *See United*, 802 F.2d at 892.[16]

The arsenal of economic weapons available to RLA employers during a strike also includes the ability to offer permanent replacement status to crossovers who occupy employee positions during the strike, *see Trans World*, 489 U.S. at 443, to alter collectively-bargained work rules in order to operate with fewer personnel, *see Brotherhood of Ry. & S.S. Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 246-47 (1966), to subcontract operations to other carriers, *see In re Ionosphere Clubs, Inc.*, 114 Bankr. at 385;[17] *cf. American River Touring Ass'n*, 246 N.L.R.B. 935 (1979), and to offer substantial monetary inducements to prospective strike replacements, *see United*, 802 F.2d at 909. These self-help options amply permit RLA employers to continue operations during a

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[16] Eastern's suggestion that the decision below permits a union to "oust" permanent replacements by "dribbl[ing] strikers back to work," Pet. 22, is simply wrong. Prospective strike replacements who complete IOE training flights and enter revenue service will occupy pilot positions and attain permanent replacement status to the extent the employer maintains *any* unfilled pilot positions and *any* pilots remain on strike. Suppose, for example, that a struck employer maintains 1000 pilot vacancies because 1000 of its pilots remain on strike. When a new hire pilot recruit completes pilot training, he or she will occupy a pilot vacancy and attain permanent status unless the strike has been called off or all 1000 pilots have sought reinstatement to the carrier's pilot vacancies.

[17] The ALPA-Eastern collective bargaining agreement restricted Eastern's ability to subcontract operations during the pilot sympathy strike. *See In re Ionosphere Clubs*, 114 Bankr. at 385. Like all RLA carriers, however, Eastern could seek judicial approval to depart from the terms of its collective bargaining agreement in order to subcontract flight operations during the strike under the standards established in *Florida East Coast*, 384 U.S. at 246-48.

strike without refusing to reinstate returning strikers to post-strike job vacancies that were not occupied by replacements during the strike.

In sharp contrast, Eastern's attempt to expand *Mackay Radio* to cover a pool of hundreds of pilot trainees would reduce the right to strike under the RLA to a nullity. Under Eastern's "offer and acceptance" theory, an employer could replace its entire striking work force on the first day of a strike by conferring permanent replacement status on a sufficiently large pool of prospective employees—even if the strike ended in two days. An employer could thereby replace its entire work force despite the fact that its "replacements" could not be qualified to perform *any* services for the employer (and thus could not help the employer continue operations) unless and until they completed training *months* after strikers sought reinstatement. Eastern's "offer and acceptance" rule thus would permit employers to nullify any strike in a matter of days without regard to actual operational needs *during* the strike and would transform every strike into an opportunity for the employer to oust the union and its supporters. *See generally Florida East Coast*, 384 U.S. at 246-47 (refusing to interpret the RLA to provide employers with a "strong reason to prolong the strike and even break the union").

Every court to consider the issue presented in the Petition has correctly recognized that the balance of interests struck in *Mackay Radio* does not permit an RLA employer to treat trainees as permanent replacements because they do not perform any employee services or replace any striker until months after strikers return to work. "To conclude otherwise would allow an employer to amass a trainee pool capable of replacing the entire striking work force at some future date after the strike has ended" without regard to the employer's actual operational needs during a strike. *Trans World*, 819 F.2d at 846.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 90-1902

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

EASTERN AIR LINES, INC.,
Petitioner,
vs.
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and
EASTERN AIR LINES MASTER EXECUTIVE COUNCIL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE AIR TRANSPORT ASSOCIATION OF AMERICA AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF EASTERN AIR LINES, INC.

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MOTION OF AIR TRANSPORT ASSOCIATION OF AMERICA AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF EASTERN AIR LINES, INC. FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Air Transport Association of America (the "Association") and Official Committee of Unsecured Creditors of Eastern Air Lines, Inc. (the "Committee") move the Court for leave to file the attached brief of amici curiae in support of the Petition for Writ of Certiorari. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondents was requested but refused.

I

NATURE OF THE INTEREST OF THE ASSOCIATION AND THE COMMITTEE

The Association was founded in 1936. It is a non-profit, unincorporated association of federally certificated air carriers providing scheduled and charter passenger and cargo service. The Association's 20 operator members account for more than 97% of the passenger and cargo traffic flown annually in the United States.[1]

Many of the members of the Association are parties to collective bargaining agreements with labor unions. It is crucial to the Association's members that courts uphold an employer's right to operate its business during an economic strike by hiring permanent replacements. An essential part of this right is the employer's ability to refuse to fire the permanent replacements to make room for returning strikers. If this right is not enforced by the courts, employers will effectively lose the ability to operate during a strike by hiring permanent replacements for the strikers.[2]

The Committee represents all of the general unsecured creditors of Eastern Air Lines, Inc. ("Eastern"). Eastern

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[1]Operator members authorizing this brief are: Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., American Trans Air, Inc., Continental Airlines, Inc., DHL Airlines, Eastern Air Lines, Inc., Hawaiian Airlines, Midway Airlines, Inc., Pan American World Airways, Inc., Southwest Airlines, Trans World Airlines, Inc., The Trump Shuttle, United Parcel Service, and USAir, Inc.

[2]In the interest of its members, the Association has filed numerous *amicus* briefs in other cases before this Court which involve employment law issues. These include: *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987); *Dep't of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986).

filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code on March 9, 1989. On March 22, 1989, the Committee was appointed by the United States trustee for the Southern District of New York. The unsecured creditors represented by the Committee include, among others, former employees, the Pension Benefit Guaranty Corporation, trade creditors, debenture holders, and aircraft and engine manufacturers, holding claims aggregating in excess of $2.3 billion. Should the decision below be permitted to stand, Eastern's estate could be subject to potential additional claims of approximately $75 million, representing claims for backpay and benefits allegedly owed to the striking pilots. The respondents assert that these claims arose during the course of the administration of Eastern's Chapter 11 estate and therefore have priority over the claims of the unsecured creditors represented by the Committee, *see* 11 U.S.C. § 503(b)(1). Thus, the Committee has a significant interest in requesting this Court to correct the erroneous decision below.

II

ISSUES TO BE ADDRESSED BY THE AMICI CURIAE

The decision below bears significantly on an airline's right to carry on its business in the face of a crippling pilots' sympathy strike. The decision below impermissibly restricts this right by holding that Eastern was required to reinstate returning strikers, notwithstanding its preexisting commitment of permanent employment to replacement pilots who were still in training when the strike ended. The amici curiae brief addresses the conflict

among the circuit courts of appeals on this issue, examines the failure of the court below to adhere to this Court's authority, discusses the national importance and practical effect of the rule adopted by the Eleventh Circuit Court of Appeals, and deals with the manner in which that rule frustrates the purposes of the Bankruptcy Code.

For the foregoing reasons, the Court should grant this Motion for Leave to File Brief of Amici Curiae in Support of Petition for Writ of Certiorari.

Dated: August 13, 1991.

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No. 90-1902

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

EASTERN AIR LINES, INC.,
Petitioner,

VS.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and EASTERN AIR LINES MASTER EXECUTIVE COUNCIL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICI CURIAE, AIR TRANSPORT ASSOCIATION OF AMERICA AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF EASTERN AIR LINES, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DESCRIPTION OF INTEREST OF AMICI CURIAE

The Air Transport Association of America (the "Association") and Official Committee of Unsecured Creditors of Eastern Air Lines, Inc. (the "Committee") adopt the statement made in the Motion for Leave to File Brief, immediately preceding this brief, as the description of the interest of amici curiae. In addition, amici curiae submit that the decision below poses a fundamental threat to an important principle of federal labor policy: the right of an employer to permanently replace strikers during an economic strike. This principle is especially important to commercial air carriers, who are charged, under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), with the duty to avoid unnecessary interruptions in the free flow of airline passengers and freight throughout the nation.

In a 2-1 decision, the Eleventh Circuit held that, following the end of an eight-month sympathy strike called by respondent Air Line Pilots Association, International ("ALPA"), replacement pilots who had been hired by petitioner Eastern Air Lines, Inc. ("Eastern"), and who were undergoing an extensive, job-specific training program mandated by Federal Aviation Administration ("FAA") regulations, were not to be accorded "permanent replacement" status. This decision is in conflict with the Fifth Circuit, which follows the "offer and acceptance" rule developed by the National Labor Relations Board ("NLRB") in analogous cases arising under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("NLRA"). Under the "offer and acceptance" rule, the employer is not required to reinstate returning strikers if the employer has made a firm commitment of permanent employment to their replacements, even if the replacements have not yet commenced work due to training requirements or other contingencies. The court below

ignored the "offer and acceptance" rule, thereby creating a split among the circuits on a legal issue which is important to all RLA employers.

The decision below also violates this Court's holdings that an RLA employer's right to self-help is broader than that which would be available under the NLRA. Despite this Court's holdings on this point, the Eleventh Circuit's majority opinion sharply limits an RLA employer's ability to carry on its business during a strike. By holding that the RLA employer must reinstate returning strikers, even if this would require the RLA employer to breach promises of permanent employment to the replacements, the decision effectively deters RLA employers from offering permanent employment to replacement workers who must undergo a lengthy period of job-specific training. The decision also may deter replacements from leaving their present jobs and accepting an offer of permanent employment if made, since the Eleventh Circuit's decision requires the employer to displace the replacements with returning strikers if the replacements are still in training when the strike ends. If the employer cannot hire sufficient numbers of temporary replacements to operate the business during a strike, as is undisputed in this case, the RLA employer would have little choice but to cease operations during the strike. This is contrary not only to federal labor policy, but also to the fundamental policy of the Bankruptcy Code, which is to permit the rehabilitation of the debtor and continuance of the business as a viable going concern. Certiorari should be granted to correct the decision below, which impermissibly restricts an RLA employer's right to use self-help to operate its business during a strike.

CONSENT OF PARTIES

Respondents to this action refused consent to the filing of this brief by the Association and the Committee. A motion for leave to file this brief is attached. Petitioner has consented to the filing of this brief and written consent is filed concurrently herewith.

STATEMENT OF THE CASE

The Association and the Committee adopt the Statement of the Case set forth in the Petition for Writ of Certiorari, as well as Petitioner's description of the Opinions Below, Jurisdiction, Statute Involved, and Question Presented.

REASONS FOR GRANTING THE WRIT

I.

REVIEW IS NEEDED TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS ON WHETHER THE NLRB'S "OFFER AND ACCEPTANCE" TEST, WHICH PERMITS THE EMPLOYER TO REFUSE TO REINSTATE STRIKERS WHEN PERMANENT REPLACEMENTS HAVE BEEN HIRED BUT NOT YET COMMENCED WORK, SHOULD BE APPLIED IN CASES ARISING UNDER THE RLA.

This Court has long recognized that an employer has the right to take such actions which are required "to protect and continue his business" during an economic strike.[1] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S.

[1] This Court has reaffirmed *Mackay Radio* on several occasions. *See NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 232 (1963) ("We have no intention of questioning the continuing vitality of the *Mackay*

333, 345 (1938). This includes the right "to replace the striking employees with others in an effort to carry on the business." *Id.* Upon the conclusion of the strike, the employer "is not bound to discharge those hired to fill the places of strikers," *id.*, but instead may honor its commitment of permanent employment to the replacement workers. Otherwise, it would be virtually impossible in many strikes to induce replacement workers to leave their existing jobs and work during the strike. *See Belknap, Inc. v. Hale*, 463 U.S. 491, 519 (1983) (Blackmun, J., concurring) ("The employer makes offers of permanent employment to induce replacement workers to take jobs.").

The *Mackay Radio* rule applies to cases, such as this, which arise under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"). *See Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426, 433-34 (1989). In the decision below, the Eleventh Circuit acknowledged that *Mackay Radio* defined Eastern's right to hire permanent replacements during ALPA's sympathy strike. The court erred, however, in holding that *Mackay Radio* did not apply to replacement pilots who had been hired during the strike but were still in training when the strike ended. It is undisputed that Eastern had promised permanent employment to all of these replacement pilots many months before the strike ended, contingent only upon their successful completion of Eastern's FAA-mandated, carrier-specific, pilot training program. Thus, the Eleventh Circuit's decision improperly required Eastern to displace the replacement pilots with returning strikers, in direct contradiction of *Mackay Radio* and subsequent decisions. *Mackay Radio*, 304 U.S. at 347 ("the [em-

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rule"); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967); *Belknap, Inc. v. Hale*, 463 U.S. 491, 504 n.8 (1983); *Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426, 433-34 (1989).

ployer] was not bound to displace men hired to take the strikers' places in order to provide positions for them").

For the past 53 years, *Mackay Radio* has provided a stable rule that governs an employer's right of self-help during an economic strike: the employer is free to make and keep commitments of permanent employment to the workers who are hired to replace the strikers. In applying this rule to cases governed by the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("NLRA"), both the National Labor Relations Board ("NLRB") and the courts have repeatedly held that an employer may refuse to reinstate strikers if this would require the displacement of replacement workers who have accepted offers of permanent employment, even if the replacements have not yet started working when the strikers unconditionally offer to return to work. This issue arises in a variety of factual settings, including cases where (1) employer personnel policies require a training or probationary period before an employee becomes "permanent";[2] (2) the job offer is contingent upon passing various posthire tests or examinations;[3] (3) the replacement requests a delay in

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[2] *E.g., Anderson, Clayton & Co., Inc.*, 120 N.L.R.B. 1208 (1958) (new hires required 1-4 months of training and were subject to a 6 month probationary period); *Kurz-Kasch, Inc.*, 286 N.L.R.B. 1343 (1987), *enf. denied on other grounds*, 865 F.2d 757 (6th Cir. 1989) (replacements did not begin work until one month after strike ended due to need to train them); *C.H. Guenther & Son, Inc.*, 174 N.L.R.B. 1202, 1212 (1969), *enf'd*, 427 F.2d 983 (5th Cir.), *cert. denied*, 400 U.S. 942 (1970) (replacements required to serve a "training or probationary period" of 30 or 60 days); *Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 804 (1964) (fact that replacements "required some training" irrelevant to whether employer intended that they permanently replace strikers).

[3] *E.g., Solar Turbines, Inc.*, 302 N.L.R.B. No. 3 (1991) (job offers contingent upon passing drug and alcohol test); *Transport Service*

starting work for his or her own convenience;[4] and (4) the employer requests replacements from a union hiring hall for strikers who refuse to cross an unauthorized picket line.[5] Under all of these circumstances, the Board and the courts have held that the employer was not required to reinstate returning strikers because the replacements had already been offered, and accepted, permanent employment.[6]

In stark contrast to the Eleventh Circuit's majority opinion in this case, *no* NLRA decision has ever held that an employer must reinstate returning strikers after their

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Co., 302 N.L.R.B. No. 4 (1991) (job offers contingent upon passing a physical exam, polygraph test, and motor vehicle records check).

[4]*E.g., International Association of Machinists v. International Aircraft Services, Inc.*, 302 F.2d 808, 810 (4th Cir. 1962) (replacements lived out of state when hired and needed time to relocate before starting work); *H. & F. Binch Co.*, 188 N.L.R.B. 720 (1971), *enf'd*, 456 F.2d 357 (2d Cir. 1972) (replacement needed time to arrange for babysitter); *Southwest Engraving Co.*, 198 N.L.R.B. 694 (1972) (replacement did not start work until husband commenced position as supervisor for same employer).

[5]*E.g., Newbery Energy Corp.*, 227 N.L.R.B. 436 (1976) (employer obtained replacements from IBEW hiring hall after employees refused to cross Teamsters picket line that IBEW did not respect).

[6]Consistent with the NLRB rule, this Court recognized, in *Belknap, Inc. v. Hale*, 463 U.S. at 504 n.8, that "[t]he refusal to fire permanent replacements *because of commitments made to them* in the course of an economic strike satisfies the requirement . . . that the employer have a 'legitimate and substantial justification' for its refusal to reinstate strikers." (Emphasis added.) In other words, it is the employer's commitment to provide a permanent job that is important, not whether the replacement has actually reported to work or is in a "productive" rather than "training" or "probationary" status. All jobs require some degree of training, which is a fact recognized by the NLRB and the courts in NLRA cases, but completely ignored by the Eleventh Circuit in the decision below.

permanent replacements have accepted binding offers of employment.[7] Instead, decisions under the NLRA uniformly recognize that the employer is "free to make and keep" its "solemn promises of permanent employment" to the replacement workers. *See Belknap, Inc. v. Hale*, 463 U.S. at 506. Indeed, for the employer to reinstate strikers and breach a promise of permanent employment to the replacements may give rise to liability for breach of contract to the replacement workers. *Id.* Rather than discuss or analyze these principles, however, the Eleventh Circuit simply declared, in a footnote, that NLRA cases were irrelevant. 920 F.2d at 725 n.3.

In contrast to the Eleventh Circuit's decision, the Fifth Circuit follows the "offer and acceptance" rule to determine whether an RLA employer may decline to reinstate strikers due to its preexisting commitments to the permanent replacements. In *National Airlines, Inc. v. International Association of Machinists*, 416 F.2d 998 (5th Cir. 1969) ("*National I*"), the Fifth Circuit held that *Mackay* defines an employer's right to permanently replace strikers under the RLA, as well as the NLRA.[8] *Id.* at 1006. Subsequently, in *National Airlines, Inc. v. International*

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[7]The only RLA decision to depart from the "offer and acceptance" rule is *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir. 1987), *cert. granted in part and denied in part*, 485 U.S. 958 (1988), *rev'd on other grounds*, 489 U.S. 426 (1989). There, the Eighth Circuit concluded that flight attendant trainees were not "permanent replacements" until the completion of their training. As discussed *infra*, the Eighth Circuit's analysis is erroneous, since the court confused the issue of whether the replacements were RLA "employees" with the question of whether the employer properly engaged in self-help by hiring permanent replacements.

[8]This court cited *National I*, with approval, for this proposition in *Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. at 433.

Association of Machinists, 430 F.2d 957 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971) ("*National II*"), the Fifth Circuit specifically applied the "offer and acceptance" rule to hold that an RLA employer could honor its commitment to permanent replacements so long as a binding offer of employment had been accepted by the replacements.[9] 430 F.2d at 961. As stated in *National II*, "if an employer has the intention to bind itself to a firm contract of employment, and the employee has accepted a specific job assignment, the replacement is 'hired' even though subsequently he may be divested of the job for failure to pass medical or security clearance." *Id. National II* cites NLRA cases in support of this rule, and correctly concluded that there is no reason to restrict an RLA employer's right of self-help to anything less than that available under the NLRA. *See Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426, 439-40 (1989) (RLA employer's right of self-help during a strike is greater than would be available under the NLRA).

In contrast to *National II*, the Eleventh Circuit majority did not look to any NLRA cases for guidance on the question of whether Eastern's promise of permanent employment should be respected.[10] Even more troubling is the majority opinion's failure to analyze the substantive

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[9] *Accord, Air Line Pilots Ass'n v. United Air Lines, Inc.*, 616 F. Supp. 849, 851 (N.D. Ill. 1985) ("Permanent replacements hired from outside the company . . . need not actually begin working in order to retain their jobs following the conclusion of a strike"), *rev'd on other grounds*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).

[10] In his dissent, Judge Anderson concluded that *National II* governed this case and compelled the conclusion that Eastern lawfully refused to reinstate the strikers due to its preexisting commitment of permanent employment to the replacements. 920 F.2d at 731.

provisions of the RLA which Eastern allegedly violated by honoring its promise of permanent employment to the replacement pilots. ALPA's cross-complaint asserts that Eastern's refusal to reinstate the striking pilots violated Sections 2, Third and 2, Fourth of the RLA, 45 U.S.C. §§ 152, Third, 152, Fourth, but neither the district court nor the Eleventh Circuit majority opinion even discussed these provisions. Rather than analyze these RLA provisions, the Eleventh Circuit simply declared that an RLA employer's refusal to reinstate strikers could be an "unfair labor practice." 920 F.2d at 725.[11]

Instead of analyzing the substantive provisions of the RLA, the Eleventh Circuit majority discussed only whether the replacement pilots fell within the RLA's definition of an "employee."[12] 920 F.2d at 726. This is irrelevant, however, to the question of whether Eastern properly engaged in self-help by offering permanent employment to the replacement pilots. The issue of whether a replacement worker is an RLA "employee" has been litigated in cases where the replacement sues the carrier for allegedly violating the replacement's Section 2 rights. *E.g., Air Line Pilots Ass'n v. United Air Lines, Inc.*, 802 F.2d 886, 910 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987) (trainees who had not yet commenced active duty

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[11]The RLA does not enumerate any "unfair labor practices." Instead, "unfair labor practices" are defined in Section 8 of the NLRA, 29 U.S.C. § 158.

[12]The RLA defines an "employee" as:

> "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect . . . ." 45 U.S.C. § 151, Fifth.

were not RLA "employees" entitled to Section 2 rights).[13] The issue is pertinent there because Sections 2, Third and 2, Fourth grant rights only to "employees" within the definition of RLA Section 1, Fifth, 45 U.S.C. § 151, Fifth. Here, however, it is the strikers, rather than their replacements, who claim a violation of Sections 2, Third and 2, Fourth. The question of whether the replacements are RLA "employees" is not pertinent — instead, the relevant issue (which was never acknowledged by either the district court or the Eleventh Circuit) is whether Eastern violated Sections 2, Third and 2, Fourth, by refusing to reinstate the strikers.[14]

The Eleventh Circuit's majority opinion is also unsupported by the decisions of this Court. This Court has never based an employer's right of self-help on whether

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[13]The Eighth Circuit decision in *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir. 1987), *cert. granted in part and denied in part*, 485 U.S. 958 (1988), *rev'd on other grounds*, 489 U.S. 426 (1989), incorrectly relied upon *United Air Lines* to hold that the employer's right to permanently replace depended upon whether the replacements were RLA "employees." Significantly, the Eighth Circuit's analysis failed to identify any provision of the RLA that had been violated by TWA's refusal to reinstate the returning strikers, and thus suffers the same analytical flaw as the Eleventh Circuit's majority opinion in this case.

[14]There is nothing in the record below that could support a finding that Eastern violated either statutory provision. Section 2, Third, 45 U.S.C. § 152, Third, prohibits employers from interfering, influencing, or coercing employees in the designation of employee representatives. Section 2, Fourth, 45 U.S.C. § 152, Fourth, provides that employees have the right to organize and bargain collectively without employer interference. Both provisions "address[] primarily the precertification rights and freedoms of unorganized employees," *TWA*, 489 U.S. at 440, and do not imply any limitation upon an employer's right of self-help when responding to a union's strike. *Id.* at 442.

the permanent replacement is a statutory "employee" under either the RLA or the NLRA. Instead, the Court has always examined whether an employer has "legitimate and substantial business justifications" for refusing to reinstate returning strikers. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). Such business justifications often take forms which are unrelated to hiring statutory employees, such as subcontracting work,[15] discontinuing certain types of work, or assigning supervisors to perform bargaining unit work. Thus, asking whether pilot trainees have achieved RLA "employee" status begs the question — the relevant issue is whether the employer's promise of permanent employment to the replacements, contingent upon the successful completion of training, is a valid business justification for refusing to reinstate the returning strikers.[16] The Eleventh Circuit's decision is erroneous, and should be reviewed by this Court to resolve the conflict among the Circuits.

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[15] *E.g., Elliot River Tours*, 246 N.L.R.B. 935 (1979) (2-year subcontract of bargaining unit work lawful response to strike threat).

[16] The NLRB recently rejected the argument that the replacement's "employee" status was relevant to the employer's right to replace in *Solar Turbines, Inc.*, 302 N.L.R.B. No. 3 (1991). There, the union argued that returning strikers should displace newly hired replacements, since the new hires who had not yet passed a drug/alcohol test were not yet statutory "employees" under the NLRA. The Board acknowledged that although "employee" status was relevant for certain purposes, such as defining the employer's collective bargaining obligation, it was irrelevant to whether the replacements had to be fired to make room for returning strikers. Instead, the only relevant issue was whether the replacements had accepted an offer of employment, conditioned upon passing the drug/alcohol test. *Id.*, slip op. at 3-4 n.3. Here too, whether the pilots were statutory RLA "employees" during their training period is simply not relevant to the question of whether Eastern engaged in lawful self-help by honoring its commitment of permanent employment to the replacement pilots.

II.

THE DECISION BELOW IS CONTRARY TO THE DECISIONS OF THIS COURT WHICH GIVE RLA EMPLOYERS A BROADER RANGE OF SELF-HELP THAN WOULD BE AVAILABLE UNDER THE NLRA.

This Court has repeatedly recognized that, once the RLA's procedures for resolving a major dispute are exhausted, the parties may "employ the full range of whatever peaceful economic power they can muster . . . ." *Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 392 (1969). In *Jacksonville Terminal*, it was the employer which attempted to enjoin the union's attempt to engage in self-help by secondary picketing. This Court declined to incorporate into the RLA any restrictions on secondary picketing that had been developed under the NLRA due to the absence of detailed legislative standards or an administrative agency (such as the NLRB) charged with statutory enforcement of the RLA. Instead, the Court held that both unions and employers are free to enjoy the "full range" of self-help following exhaustion of the RLA's conciliation procedures. *Id.* at 392-93. *Accord, Burlington Northern R. Co. v. Brotherhood of Maintenance of Way Employes*, 481 U.S. 429 (1987); *Pan American World Airways, Inc. v. International Brotherhood of Teamsters*, 894 F.2d 36 (2d Cir. 1990).

Most recently, in *Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426 (1989), this Court reviewed its prior decisions and concluded that they "have read the RLA to provide greater avenues of self-help to parties that have exhausted the statute's 'virtually endless' . . . dispute resolution mechanisms than would be available under the NLRA." *Id.* at 439 (emphasis added). In *TWA*, flight attendants who crossed a picket line and worked

during a strike were permitted to bid for, and retain after the strike, preferred assignments that were normally held by more senior striking flight attendants. This Court held that TWA's policy was a lawful means of self-help. In reaching this conclusion, this Court specifically rejected the union's argument that an RLA employer's right to self-help is more limited than under the NLRA:

> "[Prior cases] provide the backdrop for the Union's contention that, in this case, we should understand provisions of the RLA to *limit* 'the full range of whatever peaceful economic power [the parties] can muster,' *beyond* the limitations even imposed by the NRLA. This we decline to do." *Id.* at 439-40 (citations omitted, emphasis in original).

Because RLA employers are entitled to "greater avenues of self-help . . . than would be available under the NLRA," *TWA*, 489 U.S. at 439, an employer such as Eastern is entitled to at least the same, if not more, latitude in honoring its commitments to permanent replacements than is granted to NLRA employers. Since the NLRA cases uniformly permit employers to honor promises of permanent employment to replacements who are still in training (or who have not yet started work for any number of other reasons), Eastern should not be penalized for taking the same measure of self-help. Instead, Eastern merely honored its "solemn promises of permanent employment" to the replacement pilots, *Belknap, supra*, 463 U.S. at 506, as permitted by the decisions of this Court.

III.

THE DECISION BELOW RAISES POLICY ISSUES OF NATIONAL IMPORTANCE REGARDING CONSISTENT APPLICATION OF THE RAILWAY LABOR ACT AND THE FULFILLMENT OF THE OBJECTIVES OF THE BANKRUPTCY CODE.

In addition to creating conflict with the Fifth Circuit, and ignoring this Court's holdings that the right to self-help under the RLA is broader than under the NLRA, the Eleventh Circuit's majority opinion also raises two public policy issues of national importance. First, the decision conflicts with the RLA's objective of avoiding interruptions to commerce and the operation of air and rail carriers. Second, the decision ignores the fundamental policy of the Bankruptcy Code, which is intended to provide troubled companies with relief from creditors and provide an opportunity for rehabilitation of the business. The decision below would undercut both of these key policies by making it extraordinarily difficult for many RLA employers to continue their operations during a strike, thus leading to disruptions in commerce and, in cases where carriers are operating under the protection of the Bankruptcy Code, greater risks that the carrier will not be rehabilitated.

This Court has recognized that, during a strike, RLA employers must be able to engage in self-help to avoid interruptions in the operation of air and rail carriers. *See Burlington Northern, supra*, 481 U.S. at 451-52 ("the availability of . . . self-help measures . . . may increase the effectiveness of the RLA in settling major disputes by creating an incentive for the parties to settle. . . ."); *Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway Co.*, 384 U.S. 238, 244 (1966) ("The carrier's right of self-help is underlined by the public service

aspects of its business."). Here, Eastern's decision to hire replacement pilots was essential to its effort to rebuild its operations following ALPA's sympathy strike.[17] The record below shows that Eastern could not have recruited sufficient numbers of replacement pilots without the promise of permanent employment; indeed, Eastern submitted 70 declarations from replacement pilots stating that they would not have come to work for Eastern absent a promise of permanent employment. (Eastern's Petition at 4.) Thus, that promise of permanent employment was an essential element of Eastern's ability to effectively engage in self-help.

It is especially critical to commercial air carriers that they not be required to reinstate returning strikers while their replacements are still in training. Under FAA regulations, all pilots must undergo a lengthy period of carrier-specific training. Even experienced pilots who have flown similar types of aircraft for other large carriers must undergo extensive, carrier-specific training before being allowed to operate aircraft for their new employer. Moreover, pilots on active duty must comply with the FAA's "recent experience" requirement of three takeoffs and landings within the 90-day period preceding any

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[17]Although the record amply demonstrates the business necessity of Eastern's decision to hire permanent replacements, Eastern had no burden to make such a showing. Instead, the "business necessity" of a decision to hire permanent replacements is presumed. *See Flight Attendants v. Trans World Airlines, Inc.*, 132 L.R.R.M. [BNA] 2422, 2423 (W.D. Mo. 1989) ("[I]t would seem that the existence of a strike and the use by the employer of a promise of permanent tenure are the only factual matters that need be established to show business justification" for refusing to reinstate strikers); *accord, Belknap, Inc. v. Hale*, 463 U.S. 491, 504 n.8 (1983); *Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 805 (1964).

flight, as well as periodic proficiency checks. 14 C.F.R. §§ 121.439-.441 (1990).

In light of these FAA requirements, the Eleventh Circuit's majority decision would gravely limit an air carrier's ability to use self-help to operate during a strike. Replacement pilots would no longer be able to rely upon the employer's promise of permanent employment, since that promise would be meaningless if the strikers offer to return to work while the replacements are still in training. Moreover, labor unions representing pilots would be granted extraordinary bargaining power in comparison to other labor unions. Under the Eleventh Circuit majority opinion, a pilots' union could continue a strike up to the time when replacement pilots were about to complete a lengthy and costly training program, and the strikers would still be assured immediate reinstatement if they offered to return to active duty at that time.

The majority opinion of the Eleventh Circuit, if permitted to stand, would have very serious adverse effects on airline employers. It would be unfair to employers who have made legally binding promises of permanent employment to the replacement pilots. If the strikers are reinstated and displace the replacements, then the employer faces liability for breach of contract to the replacements. On the other hand, if the employer honors its commitment to the replacements and refuses to reinstate the strikers, it faces liability to the strikers under the Eleventh Circuit's reasoning. The only alternative to this dilemma would be to continue to employ both the strikers and the replacements, even though this would generally result in costly and inefficient overstaffing. Faced with these alternatives, many RLA employers would probably refrain from hiring permanent replacements, even though it may be virtually impossible for some carriers (as it was for

Eastern) to attract sufficient numbers of temporary replacements to continue operations. In many cases the employer would simply elect to cease operations during a strike due to the excessive costs, and potential liabilities, of hiring permanent replacements, thereby losing its ability to provide air service to the public.

The Eleventh Circuit's decision also runs contrary to the fundamental policy of the Bankruptcy Code. The Bankruptcy Code is intended to provide troubled companies with a "breathing spell" from their creditors, and to permit the business to be rehabilitated for the benefit of all interested parties, including creditors, equity holders, and the debtor's employees. *See* H. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 49 (1978). Contrary to this basic policy, the Eleventh Circuit decision makes it much more difficult for a struggling employer operating under Chapter 11 of the Bankruptcy Code to reorganize when faced with a strike. If a carrier operating under the Bankruptcy Code refrains from hiring permanent replacements due to the Eleventh Circuit's decision, then it significantly reduces the likelihood that it will be able to operate, and successfully reorganize, during a strike. This is a very real problem in the airline industry, where four domestic carriers are currently operating under the protection of the Bankruptcy Code.[18] When the employer is in bankruptcy, the principles underlying the Bankruptcy Code suggest that greater self-help should be permitted in order to increase the likelihood of rehabilitating the debtor.

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[18] America West Airlines; Continental Airlines; Midway Airlines; and Pan American World Airways. In addition, Trans World Airlines has publicly announced its intention to file a petition for reorganization.

Finally, the Eleventh Circuit's majority opinion might create, rather than avoid, additional disruption of airline operations in the aftermath of a strike. Following a lengthy strike, the returning strikers might not be able to immediately resume work due to the FAA "recent experience" requirements. Instead, the strikers very well may be required to undergo training before resuming active duty. It would be extremely ironic for an air carrier to suffer further delays in restoring operations due to the need to retrain returning strikers for flight duty, while permanent replacements who are near completion of their training are discharged to make room for the strikers.

CONCLUSION

For the foregoing reasons, the Association and the Committee respectfully submit that this case presents a substantial federal question for this Court's review, that the decision below conflicts with this Court's and other circuit courts' authority and that, accordingly, this Court should grant the petition for writ of certiorari.[19]

DATED: August 13, 1991.

Respectfully submitted,

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[19]Because the decision below presents important issues concerning the administration of the RLA, and because Eastern's unsecured creditors include the Pension Benefit Guaranty Corporation, the Association and the Committee respectfully suggest that the views of the Solicitor General should be requested. The Solicitor General has participated as *amicus curiae* in other cases presenting issues of an employer's right to self-help in the airline industry. *E.g., Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426, 428 (1989).

(4)

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Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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OBJECTION TO MOTION OF AIR TRANSPORT ASSOCIATION AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF EASTERN AIR LINES, INC. FOR LEAVE TO FILE AMICI CURIAE BRIEF

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Respondent Air Line Pilots Association, International ("ALPA") objects to the motion (the "Motion") of the Air Transport Association (the "ATA") and the Official Committee of Unsecured Creditors of Eastern Air Lines, Inc. (the "Creditors' Committee") for leave to file a brief amici curiae in support of the petition for a writ of certiorari in this case. In support of its objection, ALPA states as follows:

1. The Motion does not accurately state the interests of the ATA and its members in this litigation. *See* Supreme Court Rule 37.4. In particular, the Motion fails to inform the Court that United Air Lines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., Federal Express, Inc., and Evergreen Airlines, Inc.—all of whom are ATA members—have *not* authorized the proposed amici brief and presumably do *not* support the legal position expressed therein. These airlines together employ approximately fifty percent of the airline pilots in the domestic airline industry and account for approximately fifty percent of the annual passenger and air cargo revenue in the industry. Accordingly, the proposed amici brief does not remotely reflect the position or the interests of the entire domestic airline industry as the Motion claims.

2. The Motion likewise fails to disclose the membership and interests of the Creditors' Committee. In fact, ten of the Creditors' Committee original sixteen members have resigned [1] because, among other things, the liquidated estate of Eastern Air Lines, Inc. ("Eastern") will provide little or no money for Eastern's general unsecured creditors. *See, e.g., The National Law Journal* at 1, 35-36 (May 27, 1991) (explaining that Eastern's unsecured creditors expect to recover "virtually nothing" on their claims). The present Creditors' Committee does not include any aircraft manufacturers, engine manufacturers or trade creditors as the Motion suggests. Also, contrary

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[1] The ten members of the Creditors' Committee who have resigned are committee chair Airbus Industrie, ALPA, American Telephone & Telegraph Co., Boeing Co., Citicorp, N.A., General Electric Co., Lintas Corp., Marriott Corp., Rolls-Royce, PLC., and United Technologies Corp. The six remaining members are three trustees for Eastern's bondholders (American National Bank and Trust of Chicago, IBJ Schroder Bank & Trust Co., and United States Trust Company of New York), one representative of Eastern's non-union employees, and two union representatives (the International Association of Machinists & Aerospace Workers, AFL-CIO and the Transport Workers Union of America, AFL-CIO).

to suggestions in the Motion, the Pension Benefit Guaranty Corporation is not and has never been a member of the Creditors' Committee, will receive nothing or virtually nothing from the Eastern estate without regard to the decision below, and has never expressed any position on the litigation at issue in the Petition. In addition, the two union members of the six member Creditors' Committee have authorized ALPA to state that they *oppose* both the Motion and the proposed amici brief. Accordingly, the Creditors' Committee's proposed amici brief only states the parochial position of a single representative of Eastern's non-union employees and three trustees for Eastern bondholders, all of whom have no or virtually no monetary stake in this litigation.

The motion for leave to file an amici curiae brief should therefore be denied.

Respectfully submitted,

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